Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

THE PALESTINE LIBERATION ORGANIZATION, ET AL.,
Petitioners,

v.

EFRAT UNGAR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether a case brought for the death of a U.S. national in Israel, against the Palestinian Authority and the Palestine Liberation Organization, under the Anti-Terrorism Act (ATA) is justiciable in Courts of the United States if all the events occurred in Israel, or Occupied Palestine where all the parties resided and which requires judicial decisions of law and fact about (a) political events and conditions in Palestine over a period of decades, (b) various United Nations decisions and actions, (c) numerous sensitive political agreements and acts of participants in the Middle East peace process, including the United States, over a period of years, (d) the internal confidential agreements and conduct of Palestinian organizations including the Palestine Authority, the Palestine Liberation Organization and the Islamic Resistance Movement, Hamas, and their leaders and (e) the U.S. has filed a Statement of Interest in an ancillary proceeding declaring the relief requested by Plaintiffs "would have a negative impact ... in negotiations to resolve the Israeli-Palestinian Conflict."

2. Whether the Court of Appeals correctly applied the Foreign Relations Law of the United States in its determination that Palestine has not achieved Statehood which would immunize it from suit under the ATA, including its conclusion that it would be "anomalous indeed to hold that a state may *achieve* sufficient independence and statehood in the first instance" while under foreign hostile military occupation which has existed for thirty eight years including twelve years of agreements and actions in an ongoing peace process.

3. Whether the complete withdrawal of all Israel Armed Forces and Settlements from Palestinian Gaza in August

2005 has removed the last obstacles to Statehood in that part of Palestine entitling Palestine to immunity from actions brought under the ATA.

List of Parties

RULE 14.1(b) STATEMENT

A list of all parties to this proceeding in the court whose judgment is the subject of this petition is as follows:

Defendants-Petitioners:
THE PALESTINE LIBERATION ORGANIZATION; THE PALESTINIAN AUTHORITY, a/k/a The Palestinian Interim Self-Government Authority;

YASSER ARAFAT, HBRIL RAJOUB; MUHAMMED DAHLAN; AMIN AL-HINDI; TAWFIK TIRAWI, RAZI JABALI, ABDEL RAHMAN ISMAIL ABDEL RAHMAN CHANIMAT; JAMAL ABDEL FATAHTZABICH AL-HOR; RAED FAKHRI ABU HAMDIYA; IBRAHIM GHANIMAT; IMAN MAHMUD HASSAN FAUD KAFISHE, HAMAS-ISLAMIC RESISTANCE MOVEMENT, a/k/a Harskat Al-Muqawama A;-Islamiyya

Plaintiffs-Respondents:
EFRAT UNGAR, by and through the Administrator of his Estates, David Strachman, DVIR UNGAR, a minor, by his guardians and next friend, Prof. Meyer Ungar, et al; UISHAI UNGER, a minor, by his guardians and next friend, Prof. Meyer Ungar, et al; PROFESSOR MEYER UNGAR, individually and in his capacity as legal guardian of Dvir and Yishai Ungar,, JUDITH UNGAR, individually and in her capacity as legal guardian to Dvir and Yishai Ungar, RABBI URI DASBERG, individually and in his capacity as legal guardian of Dvir and Yishai Ungar; JUDITH DASBERG, individually and in her capacity as legal guardian to Dvir and Yishri Ungar, AMICHAI UNGAR; DAFNA UNGAR; MICHAL COHEN; YARON UNGAR, by and through the Administrator of his Estate, David Strachman.

Table of Contents

Statement of the Case 2

Reasons For Granting The Writ 5

A. Introduction 5

B. The Case Is Non Justicable 10

C. Palestine Is A State As Defined By U.S. and International Law 24

D. Withdrawal of all Israel Armed Forces and Settlements from Gaza in August 2005 Establishes Palestinian Statehood Under The Foreign Relations Law of the United States 30

Conclusion 30

Appendix 1a

3/31/05 First Circuit Opinion 1a

Errata Sheet 40a

5/27/03 First Circuit Opinion 41a

7/12/04 District Court Opinion 45a

1/27/04 District Court Opinion 66a

5/20/05 Rehearing Denial 83a

Constitutional and Statutory Provisions 84a

Statement of Interest of the United States of America 95a

Table of Authorities

Page

American Ins. Ass'n. v. Garamendi,
539 U.S. 396. 413-14 (2003). 10

Baker v. Carr,
369 U.S. 186, 217 (1962) 12

Biton, 01 Cv 382(RMC) (D.C.D.) 8

Department of the Navy, v. Egan,
484 U.S. 518, 529-30 (1988) 11

Gilmore, 01 Cv 853(GK)(D.C.D.) 8

Gilmore v. PA,
(D.D.C. 2004) 14

Klieman, 04 CV 1173 (PLF)(D.C.D.) 8, 9

Killburn v. Socialist People's Libyan Arab Jamahiriya,
376 F.3d 1123, 1129 (D.C. Cir. 2004) 9

Knox, 03 Cv 4466 (S.D.N.Y.) (VM) 8

Knox v. PA,
306 F.Supp.2d at 437 29

Regan v. Wald,
468 U.S. 222, 242 (1989) 11

Republic of Austria v. Altmann,
541 U.S. 677, 702, 124 S.Ct.
2240, 2255 (2004) 11

Sale v. Haitian Cent[illegible] Councils, Inc.,
509 U.S. 155, 188 (1993). 10

Saperstein, 04 CV 20225(PS) 9

Shatsky, 02 Cv 2280(RCL) 8

Sokolow, 04 Cv 347(GED)(S.D.N.Y.) 9

Sosa v. Abraez-Machain,
542 U.S. 642, 754, 124 S.Ct.
2739, 2766 n.21 (2004) 11

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774, 823 (D.C. Cir. 1984). 18

Ungar v. Palestinian Authority
315 F.Supp.2d at 178. . . . . 4, 16

Youngstown Sheet and Tube Co. v. Sawyer,
343 U.S. 579, 610-11 (1952).
(Frankfurter, J. Concurring) 10

Statutes

Anti Terrorism Act (ATA),
18 U.S.C. §§2331-2338. 6
18 U.S.C. §2337(2) 2, 30

Foreign Sovereign Immunities Act
28 U.S.C. §1604 . . . . . 2, 30

8 U.S.C. §1189
Redesignation of Foreign Terrorist Organizations, 68 Fed.Reg. 56, 860, 56, 861 (Oct. 2, 2003) 6

Charter of the United Nations
Article 25 19

Security Counsel Resolution 242 (1967) . . . 17-20, 26, 29

General Assembly Resolution 181(II) 17, 19, 20, 25

Terje Roed-Larsen,
Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary General U.N. Security Council on July 13, 2004 7

Report prepared by the Economic and
Social Commission for Western Asia,
paragraph 3-5, at page four, submitted by
the Secretary-General to the General
Assembly, a/60/65 - E/2005/13,
issued for general distribution on
24 May 2004. 8

Camp David Accords in 1978 11

The Oslo Accords,
International Law and the
Israeli-Palestinian Agreement 26

Subcommittee on Courts and Administrative Practice
of the Committee on the Judiciary
Anti-Terrorism Act of 1990,
United States Senate,
Second Session July 25, 1990
("Senate Hearing") at 34. . . . . 2, 11

Citations of Opinions and Orders

The Citation of the Court of Appeals opinion is 402 F.3d 274 (1st Cir. March 31, 2005)(A 1a); its judgment on interlocutory appeal is unofficially reported at 2003 U.S.App. LEXIS 27782 (1st Cir. May 27, 2003)(A 41a). Citations of the decisions of the Rhode Island District Court and the roman numerals it assigned to four of the decisions are: 325 F.Supp.2d 15 (A 45a) (July 12, 2004): 315 F.Supp.2d 164, *Ungar IV* (April 23, 2004): 304 F.Supp.2d 232, *Ungar III* (A 66a) (January 27, 2004); 215 F.R.D. (April 18, 2003); 238 F.Supp.2d 40, *Ungar II* (November 4, 2002); and 153 F.Supp.2d 76, *Ungar I* (July 24, 2001). *See also Ungar v. Islamic Republic of Iran*, 211 F.Supp.2d 91 (D.D.C. June 26, 2002).

Basis for Jurisdiction in this Court

The judgment of the U.S. Court of Appeals for the First Circuit sought to be reviewed was entered on March 31, 2004, 04-2079. The time of petitioners, the Palestinian Authority (PA and the Palestine Liberation Organization (PLO), to file a petition for rehearing was extended on their motion to May 13, 2005 and they timely filed their petition. The petition was denied by order entered on May 20, 2005, (A 83a). Petitioners motion to extend their time to file a petition for a writ of certiorari for 60 days, to and including Monday, October 17, 2005 was granted by Justice Souter on August 8, 2005, (05A137). This Court's jurisdiction is conferred by 28 U.S.C. §1254(1).

Constitutional and Other Provisions

Pertinent provisions of the Anti-Terrorism Act of 1991, 18 U.S.C. 2331, *et seq*, ("the ATA"), which plaintiffs invoked in filing this action, and the U.S. Constitution are set

forth in the Appendix, as are two statutory provisions that entitle petitioners to immunity for purposes of this action, 28 U.S.C. §1604 and ATA §2337(2), and that also negate the District Court's subject matter jurisdiction, as does ATA §2336(a) read with ATA §2331(4).

Statement of the Case

This action was commenced under the Anti-Terrorism Act 18 U.S.C. §2331 et seq. (the ATA), on March 13 2002 in the U.S. District Court for the District of Rhode Island by the relatives and legal representatives of Yaron and Efrat Ungar, West Bank settlers. The Ungars were fatally shot while driving in the vicinity of Beit Shemesh, Israel on June 9, 1996 by Hamas gunmen. Yaron Ungar held U.S. citizenship. His wife Efrat did not. Claims based on Efrat's death were dismissed at the outset because she lacked the American citizenship ATA requires.

The complaint named Hamas and the gunmen it alleged were Hamas members, as defendants, and also included as defendants for their alleged general support of Hamas, the Palestine Authority (PA), the Palestine Liberation Organization (PLO), President Yasser Arafat and other individuals who were alleged to be officials of the PA and/or PLO or otherwise connected with them.

The complaint alleged a civil claim for "international terrorism" under ATA §2333 and supplemental generic tort claims. The ATA was originally enacted in the fall of 1990 as the Anti-Terrorism Act of 1990 . For technical reasons it needed to be enacted again in 1992. The Appendix sets forth the statute as reenacted in 1992.

The PA, the PLO and President Arafat and the other individual defendants appeared by counsel to contest the

Court's jurisdiction. There was no appearance at any time by any of the Hamas defendants. Their default was entered. In the proceedings that followed the individual Hamas defendants were dismissed for lack of personal jurisdiction, and a default judgment was entered against Hamas.

From the outset the Palestinian defendants sought dismissal of the case for lack of jurisdiction on grounds of immunity and nonjusticiability. On defendants initial motion the Court dismissed President Arafat and the other individual Palestinian defendants for lack of personal jurisdiction, and called for plaintiffs to file an amended complaint better identifying their alleged supplemental tort causes of action. 153 F.Supp.2d 76, 95 (D.R.I. 2001) (*Ungar I*)

An amended complaint (hereinafter referred to as "the complaint" unless otherwise indicated) was filed by plaintiffs on August 23, 2001. Defendants PA and PLO moved on November 29, 2001 for its dismissal and alternatively for certification of an interlocutory appeal.

On January 30, 2002 defendants moved for leave to assert additional defenses, based explicitly on sovereign immunity supplementing their earlier claims of functional, governmental immunity.

On November 4, 2002, the Court denied all of the relief sought by defendants. *Ungar v. PA*, 228 F.Supp.2d 40 (D.R.I. 2002) (*Ungar II*). On November 20, 2002 defendants promptly moved for reconsideration, and made known their intention to file an interlocutory appeal if their motion for jurisdictional dismissal was denied. Until the motion for reconsideration was decided, defendants were unable to file an effective notice of appeal from *Ungar II*.

The November 20, 2002 motion for reconsideration remained pending for several months. During this time plaintiffs actively pressed the Court and then the Magistrate Judge to compel discovery on the merits and the filing of an answer and when defendants declined to do so because jurisdiction was undecided, pressed for entry of default and default judgment.

Defendants' motion for reconsideration was finally denied at a hearing requested by defendants on April 11, 2003. Defendants filed their interlocutory appeal immediately after entry of the Court's order.

It is clear that the Court of Appeals was correct in observing that the parties were litigating on separate tracks and were like "ships passing in the night". 402 F.3d at 279.

On the Appeal, the Court summarily affirmed the District Court's orders in a judgment dated May 27, 2003 (A 41a) that led defendants on remand to file a new Rule 12(b) motion on June 13, 2003 supported by an affidavit of Palestine's U.N. Ambassador and many exhibits. On April 23, 2004, the Court denied the motion, 315 F.Supp.2d 164 (D.R.I. 2004) (*Ungar IV*). On July 12, 2004 the Court approved the Magistrate Judge's recommendations for the entry of default judgment, 325 F.Supp.3d 15 (D.R.I. 2005), (A 45a). Judgments of over $116 million were thereupon entered against the PA and PLO. Defendants appeal to the First Circuit Court of Appeals followed.

In affirming the judgment, the Court of Appeals agreed essentially with the District Court's reasoning. It concluded that the occupation gave Israel power and control sufficient for it to defeat and prevent Palestinian statehood.

In mid-April 2005 plaintiffs commenced sweeping national and international efforts to enforce the judgment.

These enforcement efforts overall have been excessive and beyond the default judgment's proper reach. Their enormity confirms the political nature of this ATA case and the other cases that are pending.

An egregious example of excess enforcement was plaintiffs attempt to seize and sell Palestine's U.N. Mission building in New York and expel the Mission's personnel. The United Nations as amicus and the United States in a Statement of Interest, (A 95a) opposed the application. After a hearing it was immediately withdrawn by plaintiffs are placed by the Court on a suspense calendar.

Defendants time to file a petition for rehearing was extended by the Court of Appeals to May 13, 2005 and this petition was timely filed on that date. Petitioner's time to file this petition was extended on their motion to and including Monday, October 17, 2005 by Justice Souter.

Reasons For Granting The Writ

A. Introduction

The Court of Appeals acknowledges the importance of the issues presented here and their nexus to unsettled political conditions in its opening sentence: "This appeal raises exceptionally important questions of justiciability and sovereignty, emblematic of unsettled political conditions that have plagued the Middle East for many years." Those questions are inextricably intertwined with the political conditions in which they arose.

This case involves a terrorist attack in Israel that occurred on June 9, 1996, part of the decades long political violence between Israelis and Palestinians which continues to this day. The attack was carried out by the military wing of Hamas, a militant Palestinian political faction, known as the Islamic Resistance Movement, Hamas which is opposed to the existence of Israel, has been designated a foreign terrorist organization by the U.S. Department of State. See 8 U.S.C. §1189, *see also e.g., Redesignation of Foreign Terrorist Organizations*, 68 Fed. Reg. 56, 860-61 (Oct. 2, 2003). Four members of Hamas were convicted for the attack in an Israeli Court. Israel never charged the Palestine Authority (PA), the Palestine Liberation Organization (PLO), or their officials with any involvement, nor did the United States under U.S.C. §2332 of the Anti-Terrorism Act of 1991 (ATA).

Two people were killed. One, Yaron Ungar, was a U.S. citizen living in Israel with his Israeli wife and children.

The case, brought under the ATA, 18 U.S.C. §§2331-2338, was filed on March 13, 2000 in U.S. District Court for the District of Rhode Island, the residence of the attorney/administrator for the Estates of Yaron and Efrat Ungar, the only plaintiff with a residence in the U.S. Hamas, the PA, the PLO and various officials and members of those organizations were named defendants. The Hamas defendants did not appear and default judgment was entered against them. The claims of the estate and heirs of Efrat Ungar, Yaron Ungars wife, were dismissed because she was not a U.S. national as required under the ATA. Claims against officials of the PA and PLO were dismissed for lack of personal jurisdiction.

Intense political rivalry among Palestinian factions has existed throughout the long struggle for statehood. Hamas and the PLO have been principal rivals, a condition that

delayed and nearly derailed Israel's complete withdrawal of its armed forces and settlements from Gaza in August 2005, as Hamas continued to launch mortar shells into Israel from Gaza. This internal political strife among Palestinian has been reported regularly in the U.S. press and continues to this day. See, e.g. "The political and military challenge of the militants especially Hamas - to Mr. Abbas ("the new Palestinian President") and the faltering Palestinian Authority is there for all to see." Steven Erlanger, New York Times, October 14, 2005, p. 6. (parenthetical quote is earlier in the article).

This case, with many others following it, threatens to drag the judiciary of the United States into the most difficult, violent and irreconcilable foreign policy issues facing the United States in its relations with other nations and peoples. Under the banner of "simple tort case", the federal courts are marching off to the conflicts of the Middle East and elsewhere carrying with them the integrity of the U.S. judiciary and risking the foreign perception that U.S. Courts will extend their jurisdiction globally deciding the most sensitive political questions affecting the foreign policies of the U.S. and other nations as they go.

The numbers of violent deaths from the struggle are enormous. At a briefing of the U.N. Security Council on July 13, 2004, Terje Roed-Larsen, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary General, describing a period of less than four years, reported:

> "So far, since September 2000, 3,499 Palestinians and 949 Israelis have been killed. More than 34,300 Palestinians and 6000 Israelis have been injured in the daily bloodshed." S/PV 5002, July 13, 2004.

Additional statistics on deaths and injuries in occupied Palestinian territory appear in another U.N. report:

> ...Since September 2000, 70 percent of Palestinian victims have been civilians. Apart from Palestinian fighters killed and injured, civilians casualties are mainly caused by the Israeli army's disproportionate use of force.
>
> ***
>
> ...the cumulative total of Palestinian child fatalities from September 2000 through November 2004 reached 775. More than 12,000 Palestinian children have been injured since October 2000.... From September 2000 to September 2004, there were 104 Israeli child fatalities.
>
> Report prepared by the Economic and Social Commission for Western Asia, paragraph 3-5, at page four, submitted by the Secretary-General to the General Assembly, A/60/65 - E/2005/13, issued for general distribution on 24 May 2004.

Eight cases based on the ATA are presently pending in U.S. Courts against the PA and the PLO. The seven cases in addition to *Ungar* are: (1) *Biton*, 01 Cv 382(RMC) (D.C.D.) (collateral estoppel invoked to deny dismissal on grounds of statehood, act of war dismissal denied) (2) *Gilmore* 01 Cv 853(GK)(D.C.D.) (Motions to dismiss are pending). (3) *Shatsky*, 02 Cv 2280(RCL) (jurisdictional dismissal denied without opinion, proceeding to default on liability and damages), (4) *Knox*, 03 Cv 4466 (S.D.N.Y.) (VM) (jurisdictional dismissal denied 306 F.Supp.2d 424 (2004) default judgment hearing on liability and damages is scheduled for November 2005), (5) *Klieman*, 04 CV 1173

(PLF)(D.C.D.) (Jurisdictional dismissal motion briefed and awaiting oral argument now set for December 2005), (6) *Saperstein*, 04 CV 20225(PS) (application pending to reinstate and supplement jurisdictional motion for dismissal) and (7) *Sokolow*, 04 Cv 347(GED)(S.D.N.Y.) (motion to dismiss not yet filed). Two cases, *Klieman* and *Sokolow*, seek one billion dollars, trebled and attorneys fees, each. All together damages may run into the billions of dollars, an amount far beyond the capacity of a struggling population of barely four million with a per capita income of less than $500 a year to bear.

Among others, at least three cases invoking extra territorial jurisdiction, are pending against Syria which has been stripped of its sovereign immunity by a unilateral finding of the U.S. Secretary of State that it is a state sponsor of terrorism. Seven nations have been so designated: Syria, Cuba, Iran, Iraq, North Korea, Libya and Sudan. *See, Killburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004).

If the ATA cases seeking damages against the PA and PLO are ultimately successful in establishing liability and substantial awards and recoveries are made, hundreds of such ATA cases may be brought in U.S. courts by Israelis who are American nationals. The numbers of such cases from events in other nations will depend on the extent of future terrorist acts and the number of U.S. nationals who are casualties.

In time it must be assumed that other nations will seek to confer similar extraterritorial jurisdiction upon their domestic courts for deaths and injuries suffered by their citizens abroad, creating international tensions and undermining respect for national judiciaries.

B. The Case Is Non Justicable

The Constitution of the United States vests exclusive authority over the conduct of foreign affairs in the legislative and executive branches, the political branches, of the federal government. *See, e.g. American Ins. Ass'n. v. Garamendi*, 539 U.S. 396. 413-14 (2003). A majority of the clauses in Article I, Section 8 delegate powers to the Congress involving foreign affairs including war powers, power to regulate foreign commerce, to borrow money on the credit of the U.S., to establish a uniform rule of naturalization and regulate the value of foreign coin, to define and punish piracies, felonies committed on the high sea's and offenses against the law of nations.

The President has comparatively little direct delegation of power to conduct foreign affairs in Article II, Section 2, but the nature of that delegation includes vast power. He is Commander and Chief of the armed services, has the power to make treaties, nominate and appoint Ambassadors and, other public Ministers and Consuls by and with the Advice and Consent of Senate and receive Ambassadors and other public Ministers. And "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952). (Frankfurter, J. Concurring). The President has "unique responsibility" for the "conduct of 'foreign and military affairs'" *Sale v. Haitian Centers Councils, Inc.*, 509 U.S. 155, 188 (1993).

Recognizing the vast constitutional commitment of foreign affairs to the Executive Branch, courts have long accorded the Executive Branch the "utmost deference" in matters involving the conduct of foreign affairs. *See, e.g., Department of the*

Navy, v. Egan, 484 U.S. 518, 529-30 (1988). The Supreme Court has held that "(M)atters relating to the conduct of foreign relations... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference". *Regan v. Wald*, 468 U.S. 222, 242 (1989).

Two decisions by this Court last year suggest federal courts should give serious, perhaps decisive, weight to the United States' foreign policy interests as stated by the executive branch and where those interests conflict with claims in pending litigation, the claims may be dismissed. *See e.g. Sosa v. Abraez-Machain*, 542 U.S. 642, 754, 124 S.Ct. 2739, 2766 n.21 (2004) (where the United States offers its opinion on matter of foreign policy, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Republic of Austria v. Altmann*, 541 U.S. 677, 702, 124 S.Ct. 2240, 2255 (2004) (where the United States files a statement of interest concerning the exercise of jurisdiction over a foreign sovereign, "that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy").

The Legislative and Executive Branches have labored for decades on the Middle East Peace Process. It is doubtful that any other foreign policy concern has consumed more time of U.S. Presidents and Secretaries of State since the Camp David Accords in 1978 than the continuing crises in the Middle East.

Congress enacted the Anti-Terrorism Act of 1990 largely in response to the seizure of the Italian cruise ship Achille Lauro in the eastern Mediterranean and the death of Leon Klinghoffer a U.S. citizen. The Act was a floor amendment to the Military Construction Appropriation, Fiscal Year 1991.

It purpose was "To provide a new civil cause of action in Federal law for international terrorism that provides extra territorial jurisdiction over terrorist acts abroad against U.S. nationals.

It relied on a District Court ruling that it had jurisdiction in a case brought by the Klinghoffer family against the PLO. *See Klinghoffer v. Achille Lauro*,816 F.Supp.930 (S.D.N.Y. 1993). Legislative power over admiralty, piracy and felonies committed on the high sea's provided constitutional bases for Congressional action. After jurisdiction was upheld by the Courts, the case was settled though the public record showed that the PLO played no role in the seizure of the Achille Lauro and President Arafat's personal intervention forced its captors to surrender the ship and its passengers without further injury, or loss of life. 136 Cong. Rec. S. 14279, et seq.

Baker v. Carr, 369 U.S. 186, 217 (1962) set forth the guiding principles most commonly cited for determining whether an issue is justiciable under the Constitution:

> [p]rominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by

various departments on one question. 369 U.S. at 217 (1962)

These guidelines, read against the opinions below, leave no doubt that the District Court and the Court of Appeals have considered and decided political questions delegated to the political branches of government. The effect of the judicial intrusion into foreign policy issues will seriously interfere with the conduct of foreign policy by the political branches and exceed the constitutional power of the judiciary.

There is a textually demonstrable commitment of the foreign policy issues raised in this case to the political branches in Article I and Article II of the Constitution. There are no judicially discoverable and manageable standards available to the U.S. judiciary for resolving the issues arising from the violent political conflict in the Middle East. It is impossible for the judiciary to decide the issues without initial policy determinations that are clearly to be made by the political branches.

The description above of the basic division of power over foreign affairs in the Constitution is largely taken from the Statement of Interest of the United States dated September 12, 2005 filed in the U.S. District Court for the Southern District of New York in a proceeding to enforce the monetary judgment in this very case. *Ungar v. PA*, 18 MS (S.D.N.Y.) (2005).

Under the heading "The Relief Requested By Plaintiffs Would Seriously Undermine The United States Foreign Policy Goals For The Middle East", the Statement of Interest asserts:

As a preliminary matter, it is the judgment of the United States that the relief requested by Plaintiffs

"would have a negative impact at an extraordinarily sensitive moment in the negotiations to resolve the Middle East conflict." Drori Dec., Exh. J, at 3. The United States is deeply involved at the highest levels in promoting a "Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict," which articulates a vision of the development of "an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors." See, Drori Dec., Ex. L. (Press Release, United States Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003)). The United States has a national security interest in helping Israel and the Palestinians end the ongoing violence and move forward with negotiations. See Drori dec., Exh. J, at 3-4. Encouraging both the new Palestinian leadership and ongoing reform of Palestinian institutions is a key component of the United States' strategy for peace in that region. *Id.* At 3. A just, lasting, and comprehensive peace between Israel and its neighbors has been a long-standing foreign policy goal of the United States in the Middle East, and the United States must maintain its ties and contacts with all sides in order to advance that goal. *Id.* Appendix at 95a.

It is the first Statement of Interest by the United States in the five and a half year history of this case and in ten other cases currently defended by petitioners counsel brought against the PA, PLO, Syria and individual defendants for deaths and injuries occurring in Israel, Occupied Palestine and Turkey. Defendants repeatedly requested a Statement of Interest from the Department of State in those cases. A written request made by the Court in *Gilmore v. PA*, (D.D.C. 2004) to the Department of State for its views was rejected.

The Department of State decided to act when the enforcement proceeding in this case involved an effort to seize, sell and eject Palestinian officials from the Permanent Observer Mission of Palestine to the United Nations. The United Nations filed a brief *amicus curia* in the proceeding as well to express concern for rights under the U.N. Headquarters Agreement, a treaty between the U.S. and the U.N. protecting U.N. operations at its headquarters in New York. While there is a special foreign policy interest in protecting Missions to the U.N. from domestic interference in the United States, the Department of State clearly bases its Statement of Interest on the impact of the litigation on the deep involvement of the U.S. in promoting a "Roadmap to the Permanent Two state solution to the Israel-Palestinian conflict." The same, or greater impact, is risked in the ATA suits which threaten U.S.-Palestinian relations and the Palestinian economy.

William Howard Taft, IV, the Legal Adviser to the State Department confirmed the harmful impact of actions brought under the ATA in testimony before the Senate:

> Thus, while it was Congress' intent to address the suffering of victims of international terrorism, the legislation it has passed piecemeal over the years has proven unsatisfactory in several respects. The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer, and damaging to the foreign policy and national security goals of this country.

Hearing before the Committee of Foreign Relations, United State Senate, July 17, 2003 on Benefits for U.S. Victims of International Terrorism. S, HRG. 108-214.

Mr. Taft observed that in most cases, "the defendant states have not even appeared in the suits, nor do these states typically have very many assets in the United States against which a judgment may be executed." *Id.* at 2-3. Fourteen persons from thousands of victims of terrorist acts recovered $386 million dollars from the U.S. Treasury in single federal program to compensate victims. *Id.* at 3. The vast majority of victims received nothing. He also noted that "Recently, an Iranian Court entered a default judgment against the United States in a tort case "for $500 million". *Id.* at 4.

Under the legislation to compensate victims of terrorism, the Department of State proposed, for victims, or a victims family, quick uniform payments without proving who was responsible for the terrorist act. The amount to be paid to the family of a victim killed by a terrorist act was $262,000, subject to an automatic escalation clause. Persons injured, or held hostage, would receive up to that amount from a schedule set by the Secretary of State. *Id.* at 6.

Both the District Court and the Court of Appeals thoroughly trounced some of the most politically sensitive and fundamental principles on which the Middle East Peace process has proceeded.

Among them, the District Court held Palestine lacks a defined territory. Citing the Interim Agreement of September 13, 1993, it wrote "Israel surrendered some of its sovereignty over undefined areas within occupied Palestine to the PA so that the PA could govern the Palestinian people within Israeli territory." *Ungar v. Palestinian Authority*, et al 315 F.Supp.2d at 178. Israel has not claimed sovereignty over the occupied territory at issue or that it is "Israeli territory." In direct conflict with the Courts decision, the Interim Agreement in Article 1 provides "The two sides view the West Bank and the Gaza Strip as a single territorial unit, the

integrity and status of which shall be preserved during the interim period."

The District Courts statement also conflicts with nearly forty years of U.N. Security Council decisions and the consistent agreement of Israel and the PLO on which the peace process has been based. Security Counsel Resolution 242 (1967) determines for all parties that because territory cannot be acquired by war, Israel Armed Forces must withdraw from the territories it occupied in the 1967 War and all belligerency must terminate and all parties must respect the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

In conclusion, the District Court, in what it called a common tort case decided that Palestine does not possess a defined territory, a permanent population, a government with control over its territory and population, or capacity to conduct foreign relations. Ths is a complete denial of the existence of the Palestinian lands and peoples established in the Mandate for Palestine in 1922, described in G.A. Resolution 181(II) and the specific lands and population recognized by Israel, the Palestinian people and the international community since at least 1967.

Perhaps the boldest venture into the political questions thicket by the District Court are its findings, in a default judgment following its determination that it had subject matter jurisdiction, which hold that the PA and PLO are liable in the amount of $116,000,000 for criminal acts for which members of Hamas alone had been earlier convicted in an Israeli criminal court. Tensions between the PLO and Hamas have characterized the Palestinian condition for decades and never

more directly than during the August 2005 withdrawal of Israel from Gaza.

Such judicial findings are a serious provocation, threatening peace and the credibility of U.S. foreign policy in the Performance Based Roadmap of 2003 presently led by the U.S. for which the State Department expressed concern in its Statement of Interest. App. 95a.

All of the investigative resources of the U.S. executive can only estimate and mistake the degree of relationship between Iraq and al Quaeda in the decade preceding September 11, 2002, or between the PLO and Hamas over decades of conflict, yet a U.S. District Court, affirmed on appeal, has held the PLO liable for acts of Hamas. Such findings are so contrary to universal understanding that they can change international respect for the U.S. judiciary.

The frustrations of Judge Robb in *Tel-Oren v. Libyan Arab Republic* ring truth: "It seems to me the political question doctrine controls. This case is not justiciable. This case involves standards that defy judicial application... This case attempts to focus on the so-called PLO... And can we conceive of a successful attempt to sort out ultimate responsibility for these crimes?" *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984).

The Court of Appeals ventured even further into the thicket of Middle East politics in its opinion. Endeavoring to write "The Historical Background" of Palestinians struggle for Statehood from World War I to 2005, opinion 402 F.2d at 284-88, a daunting task. The Court characterizes events in every paragraph in ways that inescapably contain factual and political implications that are bitterly disputed by the participants and by commentators. A dubious enterprise for a historian so soon after the events, the Court begins its

account with the Mandate for Palestine, a system that "grew out of the idea that some former colonies of nations defeated in World War I were 'not yet able to stand by themselves'..." id. at 284, and ends with "a glimmer of hope; the recent [2005] election of a new PA president..." *id.* at 288.

The imperial element in the analysis of the Court of Appeals is further revealed by its brief consideration of the role played by political recognition in determinations of statehood, which it concludes with the clique "...all roads lead to Rome." 402 F.2d n.6 at 284.

Devastating to the position of Palestine in the peace process and contrary to the entire reliance on United Nations authority over the Question of Palestine, the Court of Appeals described UN General Assembly Resolution 181(II) as "...an aspirational plan..." for Palestinian Statehood and Security Council Resolution 242 as a "hortatory call for Israeli withdrawal" from Occupied Palestine. The Court of Appeals withdrew the panel's use of the words "aspirational" and "hortatory" in an errata sheet filed on May 19, 2005, (A 40a), [see docket entry 5/19/05 995051-1] the day before denying rehearing en banc on May 20, 2005. But it left two historic acts of the UN as merely a "plan" for a two state solution in Palestine and a "call" for withdrawal of Israels occupation forces without the force in law. 402 F.3d at 296, 291.

Far from being merely "hortatory", or simply a "call" for some action, Security Council Resolutions are binding orders. "The Members of the United Nations agree to accept and carry out the decisions of the Security Council..." Article 25, Charter of the United Nations.

In holding G.A. Res. 181 "an aspirational plan" the Court of Appeals panel ignored the fact that the claim of Israel to

statehood was derived from and based on G.A. Res. 181, and that Israel itself proclaimed in its Declaration of Independence, issued at Tel Aviv on May 14, 1948, "This recognition by the United Nations of the right of the Jewish people to establish their independent State may not be revoked. It is, moreover, the self-evident right of the Jewish people to be a nation, as all other nations, in its own sovereign State."

Israel, Palestine and all parties participating in the Middle East peace process since 1967 have consistently bound themselves to the command of S.C. Res. 242. The United Nations authorization of the use of force in the Gulf War in 1991 was based on a Security Council Resolution of no greater authority than S.C. 242 (1967).

The denigration of G.A. Res. 181 and S.C. Res. 242 by a U.S. Court strikes at the very foundation of efforts to achieve a two state solution to the struggle for peace in the Middle East and the role of the United Nations in the process.

This far reaching extra territorial jurisdiction involves the federal judiciary in cases that inherently deny equal justice under law. Palestinian and Israeli victims without dual U.S. citizenship are excluded. Palestinians cannot sue Israel in U.S. courts for terrorist acts in Palestine because Israel has sovereign immunity. Only a handful of the victims of terrorism will bring suits in the U.S. and huge awards made in their cases will threaten the economy of other victims of terrorist acts and the general population. The Department of State may file a Statement of Interest at any time, disrupting the judicial administration of cases for political reasons and selectively deny recovery for some victims.

Such exercise of political power by the Executive threatens the integrity of the jurisdiction of federal courts by

altering it on political decisions of the moment, threatening the rule of law itself. Federal Court jurisdiction cannot depend on political decisions or whims of the executive that can alter its jurisdiction and the rights of litigants at any time in a judicial proceeding for political reasons.

The Court of Appeals insistence that the District Court did not make a political statement in calibrating the size of the award can be understood only in terms of U.S. law and economic values in isolation who without regard for reality in the lives of others. But this new extraterritorial power of U.S. Courts to adjudicate "ordinary torts" occurring in foreign lands among people who live there, under conditions as they exist there which are most often dire poverty, and award $116,000,000 for whatever tragedy is beyond imagination and all understanding. For a Palestinian it is the earnings from more then 116,000 years of personal labor, based on wages twice the annual per capita income of the people. It is unannounced, unexpected and discriminates against the far larger number of Palestinians killed and injured by Israeli violence, whether U.S. citizens or not, since sovereign immunity would protect Israel from suits in the U.S.

The large population in Israel and in Israeli settlements in the West Bank that has both Israeli and U.S. citizenship and is overwhelmingly living lives indistinguishable from their single citizenship neighbors has been given the chance through U.S. courts for an undreamed of fortune for death or injury from acts defined in the Anti Terrorism Act, unless they are committed by the Government of Israel. The price may be the hope for peace.

The rational perception among Palestinians can only be that the United States is taking sides and its courts are an instrument in a policy intending to further enrich the

occupying power and impoverish their people. As noted above, the potential liability from eight suits presently pending is billions of dollars.

In *Ungar*, efforts to collect the judgment have reached banks and other financial institutions across the U.S., threatened forced sale and ejectment of the Permanent Observer Mission of Palestine to the U.N. from premises owned since 1980, caused the bank of the PLO Mission to the U.S. in Washington to deposit PLO funds in the registry of the U.S. District Court and reached out into an unknown number of U.S. states and foreign nations in search of Palestinian assets.

The cases cannot address the tragedy, or human need caused by terrorist acts and government violence which includes tens of thousands of direct victims and whole populations indirectly. The impression in Palestine will be that billions of dollars are being paid to a handful of Israeli-U.S. dual citizens for violence that takes Palestinian lives by the thousands leaving Palestinian families impoverished and without recourse. Israeli-U.S. citizens and their heirs who bring suit will spend years seeking unconscionable wealth from judgments by U.S. courts for personal tragedy in the Middle East, and perhaps embitterment at their failure to receive payment, while the vast majority of the victims of violence will find no relief from their suffering.

Because of the pervasively political nature of cases brought under the ATA, there will be no defense on the merits wherever jurisdictional challenges and claims of nonjusticiability fail. Most nations stripped of sovereign immunity as "State sponsors of terrorism" by the ex parte act of the U.S. Secretary of State see 28 U.S.C. §1605(a)(7), and denied the equal sovereignty promised by Article 2 of the U.N. Charter, have filed no response to cases brought against

them for alleged terrorist acts. Where jurisdictional defenses have been raised and failed, as in *Ungar*, the States have defaulted. Except in rare circumstances a successful defense of the merits will be impossible, whatever the truth of the allegations.

The principal reason for default is that if sovereign pride is overcome and jurisdiction is challenged and fails, once the issues become liability and damages, discovery under U.S. procedures is so intrusive that it is impossible to comply without exposing government leaders and officials to depositions compelled by U.S. courts and disclosure of confidential government information, activities and relations that for important political reasons including national security, domestic unity, protection of officials, or allies, investigative and enforcement practices and mere embarrassment, will not be disclosed. The depositions of political leaders, production of documents, exposure of highly confidential activities and relationships affecting unity and loyalty simply cannot be sacrificed to a case initiated for political purposes in the first place. In *Ungar*, plaintiffs repeatedly noticed and otherwise sought to conduct depositions on the merits of President Arafat and senior Palestinians officials with high-level security and law enforcement responsibilities in Gaza, the West Bank and East Jerusalem. These depositions were intended to achieve full disclosure of the relationship between the PA, the PLO, and Hamas in which the military, police and governmental policies and activities of each would be exposed to Palestinian and foreign view, risking greater internal division and hostility and foreign exploitation.

If the PA and PLO submission to discovery is seen by Hamas and others as intending Hamas harm, or is harmful, it can cause direct conflict between them and diminish public support for the leadership of the government. The importance of such a loss cannot be judicially measured.

Given Israel's ongoing belligerent occupation of Palestine for more than three decades, such discovery is a danger and affront to the Palestinian government and people and presents serious risks to sensitive Palestinian national interests and hopes for achieving peace through government actions seeking sovereignty, territorial integrity and political independence for Palestine and peace with its neighbors.

The parties in *Ungar* lived in Israel, or in occupied Palestine. The events occurred in Israel. The Israeli courts are open and competent. The integrity of the constitutional function of the U.S. judiciary cannot be sacrificed for petty political motives to a legislative scheme that will harm the foreign policy of the U.S., fail to prevent terrorism, fail to aid victims of terrorism and expand the jurisdiction of U.S. Courts to the most politically and emotionally charged nonjusticiable events occurring on this violent planet.

C. Palestine Is A State As Defined By U.S. and International Law

The Court of Appeals has erred by failing to recognize that Palestine has achieved all the elements required by U.S. and international law to become a state both before and while under hostile occupation.

The Court below correctly states that "International law defines a state as 'an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities," citing the Restatement (third) of the Foreign Relations Law of the United States. Opinion p. 32.

Palestine was provisionally recognized as an independent nation in Article 22, para. 4 of the Covenant of the League of

Nations in 1922, subject only to "administrative advice and assistance" from more mature governments. It possessed a defined territory, a permanent population with government institutions in control and capable of conducting foreign relations. It was placed under a Mandate for the purpose of advice and assistance, not foreign control. Palestine had obtained Statehood in 1922.

In 1947, the United Nations Special Committee on Palestine and the Mandatory Power for Palestine agreed that as prescribed in G.A. Res. 181(II) both Palestine and Israel were "ripe" for self government and that the Mandate should be terminated and independence recognized. Their territories were defined, their population permanent, both were under the control of governments deemed adequate for control and clearly capable of conducting foreign relations. Israel declared its independence on May 14, 1948 based on its right recognized in General Assembly Resolution 181 (II). The same right was recognized equally for Palestine. Earlier on November 11, 1947, the Report of Sub-Committee 2 of the Ad Hoc Committee had declared "...the General Assembly is not competent to recommend, still less enforce, any solution other than the recognition of the independence of Palestine." (A/AC.14/32, and Add 1, 11 November 1947, para. 18). Palestine, believing the division of the territory was unfair to its greater entitlement and larger population, did not proclaim its independence, but its statehood as defined in international law was established in fact and equal to Israel's.

After the Six Day War in 1967 in which Israel occupied the Palestinian Gaza Strip and West Bank including East Jerusalem, the U.N. Security Council passed its historic Resolution 242 "Emphasizing the inadmissability of the acquisitions of territory by war".... and requiring "Withdrawal of Israel armed forces f rom territory occupied" that year and "acknowledgment of the sovereignty, territorial

integrity and political independence of every State in the area."

Since 1967, Israel, Palestine and the international community have recognized the binding force of S.C. Res. 242.

By the time of the Israel-Palestinian Interim Agreement of 1995, Professor Geoffrey Watson on whom the Court of Appeals partially relied, see, e.g. 402 F.3d at 292, conceded the requirements of territory, population and conduct of foreign relations were met by the PA under hostile occupation, but found it "not clear" that Palestine met the requirement of a government in control. *The Oslo Accords, International Law and the Israeli-Palestinian Agreement*, Oxford University Press, 2000, p. 69. Professor Watson did not consider the wide range of government activities conducted by the many governmental agencies in Palestine in addition to those of the PA, including the powerful Palestine National Council and the PLO, or the totality of governmental powers and activities of all the institutions in Palestine which, with the PA, constitute the government of Palestine.

By 2000, the only government within occupied Palestine was the PNC, the PA, the PLO and the many Palestinian agencies through which government services were provided to the people. Israeli governmental entities and personnel had completely withdrawn from activities in the Palestinian territories, except for its occupying military forces and settlements. Any limitation on Palestinian control over its territory, peoples and foreign affairs was imposed by force and interim agreements reached in the peace process. Combined such agreements did not deprive Palestine of effective government control over its territory and population. The limitations imposed by the interim agreements, even to the extent they were coerced, are like similar agreements of

a wide variety made by most states for specific agreed purposes. The capacity of a hostile military occupation force to interfere in Palestinian life cannot destroy statehood by random stifling of its exercise.

International law does not require that a state "have any particular form of government, but only that there must be some authority exercising governmental functions which is also able to represent the entity in international relations. *Restatement*, §201. Comment d. Palestine had extensive authority exercising virtually all governmental functions in Palestine well before 2000 even while under hostile military occupation.

Under international law, an entity does not cease to be a state even if it "voluntarily turns over to another state control of its foreign relations." *Restatement* §201, Comment e. The PLO had been effectively engaged in a broad range of activities involving foreign affairs at the United Nations, with numerous other international organizations, some with full PLO membership, and through its own Embassies in scores of nations for decades. The PLO now maintains embassies and missions in more than 100 countries.

The effectiveness of Palestine's engagement in formal relations with other states and their support for Palestine is suggested by General Assembly Resolution 58/292 of May 17, 2004, among others. There by a vote of 140 nations to 5, the General Assembly:

> 1. Affirms that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of the military occupation, and affirms, in accordance with the rules and principles of international law and relevant resolutions of the United Nations, including Security Council

> resolutions, that the Palestinian people have the right to self-determination and to sovereignty over their territory and that Israel, the occupying Power, has only the duties and obligations of an occupying Power under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 and the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, of 1907.

The six dissenting nations were the Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Israel and the United States.

Under international law, as provided in the Restatement, statehood does not depend on diplomatic, or political recognition. See, *Restatement*, §202 comment b. Any other rule would invite chaos and war. The equal sovereignty of states is an essential principle of international law, as well as the United Nations.

The Court of Appeals acknowledged that a state maintains its statehood during a belligerent occupation citing the *Reinstatement*, §201, reporters note 3. Opinion at p. 33, footnote 8.

The Court of Appeals rejected the evidence that Palestine had achieved all the elements of statehood required in international law, the commitments of the Covenant of the League of Nations and the General Assembly of the United Nations to Palestinian statehood, sovereignty and independence and findings supporting their existence and other evidence from Palestines long struggle for statehood after the break up of the Ottoman Empire.

Finally the Court of Appeals rejected the idea that a State can emerge during a hostile military occupation. While it is unquestionably important to peace and self determination that a state be able to fully develop under hostile military occupation, the Court of Appeals repeatedly cites *Knox v. PA*, 306 F.Supp.2d at 437 for the proposition that "...it would be anomalous indeed to hold that a state may *achieve* sufficient independence and statehood in the first instance while subject to and laboring under the hostile military occupation of a separate sovereign". 402 F.3d at 290. But this is the very result sought throughout the long, frustrating Middle East peace process. It was also the intention of the Mandate systems under the League of Nations and the United Nations that statehood emerge from that process. Far from being anomalous, such emergence is the very goal required by S.C. Res. 242, all the agreements of the parties to the peace process, and all of the advances in the peace negotiations during the occupation.

The Court of Appeals cites no other authority for its reliance on the ipse dixit of the District Court in *Knox* which alone has declared it anomalous for statehood to be achieved in a process requiring statehood as its end. The Court of Appeals erred in holding that Palestine had failed to achieve statehood under international law while under hostile miliary occupation.

The decision of the Court of Appeals holding Palestine failed to achieve statehood, after briefing and argument, should be reversed and judgment entered that having achieved statehood, Palestine is immune from suit under 28 U.S.C. §1604 of the FSIA and 18 U.S.C. §2337(2) of the ATA.

D. Withdrawal of all Israel Armed Forces and Settlements from Gaza in August 2005 Establishes Palestinian Statehood Under The Foreign Relations Law of the United States

Since the complete withdrawal of all Israeli forces and settlements from Gaza at the end of August 2005, less than five months after the Court of Appeals decision, the issue of Palestinian statehood under international law has been established beyond question. Political declarations by Palestine intended to preserve the protections of the Geneva Convention of 12 August 1949 and the Hague Convention of 1907 for its people do not alter the fact that Palestine meets all the criteria for statehood under international law at least in Gaza.

Conclusion

The Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the First Circuit should be granted.

Dated: October 17, 2005

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-2079

[March 31, 2005]

EFRAT UNGAR ET AL.,	)
Plaintiffs, Appellees,	)
	)
v.	)
	)
THE PALESTINE LIBERATION	)
ORGANIZATION ET AL.,	)
Defendants, Appellants.	)
	)

OPINION

SELYA, Circuit Judge. This appeal raises exceptionally important questions of justiciability and sovereignty, emblematic of unsettled political conditions that have plagued the Middle East for many years. In it, the Palestinian Authority (PA) and the Palestine Liberation Organization (PLO) ask us to countermand the district court's refusal to dismiss the action against them. They contend that the case hinges on a nonjusticiable political question and that, at any rate, the defendants enjoy sovereign immunity. In the event that these arguments do not carry the day, the defendants seek vacation of two $116,000,000-plus default judgments, one entered against each of them, on the ground that they were entitled to a binding determination of sovereign immunity (including appellate review of any unfavorable decision) before being forced to bear the burdens of litigation.

After careful consideration of the relevant legal authorities and perscrutation of an amplitudinous record, we conclude that this case is justiciable; that the defendants have not established an entitlement to sovereign immunity; and that the defendants' strategic litigation choices undercut their arguments as to the sequencing of the litigation. Consequently, we affirm the judgment below.

I. BACKGROUND

This case had its genesis in a terrorist attack that occurred in Israel on June 9, 1996. On that date, Yaron Ungar (a citizen of the United States), his wife Efrat, and their infant son Yishai were driving home from a wedding. Near Beit Shemesh, a car approached the Ungars' vehicle and loosed a salvo of machine-gun fire, killing both Yaron and Efrat. The three occupants of the attacking vehicle were all members of the Hamas Islamic Resistance Movement (Hamas), a group designated as a terrorist organization by the United States Department of State. *See* 8 U.S.C. § 1189; Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860, 56,861 (Oct. 2, 2003). The authorities apprehended the three assailants and, soon after, arrested a fourth Hamas member as an accessory. An Israeli court convicted all four men.

David Strachman was appointed as the administrator of the estates of Yaron and Efrat Ungar. On March 13, 2000, Strachman and other plaintiffs filed suit in the United States District Court for the District of Rhode Island pursuant to the Anti-Terrorism Act (ATA), 18 U.S.C. §§ 2331-2338. That statute provides a cause of action in favor of any "national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs." *Id.* § 2333(a). Venue for such an action may be laid in, inter alia, "any district where

any plaintiff resides," *id.* § 2334(a), and the plaintiff(s) may recover treble damages, costs, and attorneys' fees, *id.* § 2333(a).

The original complaint set forth both ATA and state law claims. It was brought by numerous plaintiffs against numerous defendants. We need not call the roll; for all practical purposes, the case boils down to a suit involving the estate and heirs of Yaron Ungar as plaintiffs and the PA and the PLO as defendants.[1] The centerpiece of the complaint was an allegation that the defendants had engaged in international terrorism within the purview of the ATA. *See id.* § 2331(1).

On an ensuing motion to dismiss, the district court rejected an assertion that the PA and the PLO were immune from service of process. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 90-91 (D.R.I. 2001) (*Ungar I*). However, the court dismissed the state law claims, finding that Rhode Island choice-of-law principles favored the application of Israeli law. *Id.* at 98-99.

The plaintiffs served an amended complaint on August 23, 2001, asserting one claim under the ATA and three Israeli

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[1] On the plaintiffs' side, the claims brought by the estate and heirs of Efrat Ungar were dismissed because she was not a United States national. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 97 (D.R.I. 2001). On the defendants' side, a number of Hamas defendants were sued, but none of them entered an appearance and, accordingly, the district court defaulted them. *See id.* at 85 n.2. The court dismissed the action as to several other defendants for want of in personam jurisdiction. *Id.* at 95. For present purposes, then, it simplifies matters to think of this case as a suit by Yaron Ungar's estate and heirs against the PA and the PLO.

law claims, all on behalf of the estate and heirs of Yaron Ungar. The PA and the PLO moved to dismiss the amended complaint on essentially the same grounds as previously urged, adding only that the claims were nonjusticiable. Alternatively, they sought to have the district court certify, pursuant to 28 U.S.C. § 1292(b),[2] various questions, including a question as to whether the defendants were entitled to a non-specific "functional" immunity "arising from the peculiar status of the PA as a functioning governmental entity." At that point, the defendants were not claiming statehood; they argued only that the policy considerations underlying the ATA's recognition of immunity for foreign states "applied equally" to them.

The PA and the PLO later changed their position. On January 30, 2002 -- during the pendency of their motion to dismiss the amended complaint -- they jointly moved for "leave to assert defenses." In the memorandum accompanying that motion, they for the first time claimed an immunity from suit based on sovereignty. They explained that they initially

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[2] This statute provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable . . ., shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

28 U.S.C. § 1292(b).

had chosen not to seek immunity on the basis of statehood and suggested that emergent political events in their region had caused a change of plan. The motion for leave to assert defenses was a curiosity -- the defendants had not yet answered the amended complaint and were free to assert, by motion to dismiss or otherwise, any colorable defense -- and the district court never acted on it.

In the same time frame, the defendants moved for a stay of discovery and the plaintiffs moved for an order compelling discovery. The court granted the requested stay pending resolution of the motion to dismiss the amended complaint. On November 4, 2002, the district court denied the dismissal motion and dissolved the stay. The court flatly rejected the claim of nonjusticiability. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 228 F. Supp. 2d 40, 44-47 (D.R.I. 2002) (*Ungar II*). It also determined that the amended complaint stated claims upon which relief could be granted both under the ATA and under Israeli law. *Id.* at 47-48. Finally, the court reiterated its earlier rejection of the defendants' claim of immunity from service of process and added that the PA, as a governmental entity, was not a sovereign state immune from suit under the ATA. *Id.* at 48-49. Finally, the court declined the defendants' invitation to certify questions for interlocutory review. *Id.* at 49-51 (citing *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47-49 (2d Cir. 1991)).

The PA and the PLO moved for reconsideration and again asked for a stay. Some two months later, the district court granted the plaintiffs' outstanding motion to compel discovery, giving the defendants additional time to respond due to their overseas location. The defendants nonetheless moved for reconsideration of the discovery order and submitted a letter from Palestine's permanent observer at the

United Nations, which stated that the defendants could not be expected to respond to discovery due to the unremitting violence in the region. The letter suggested that the defendants should be allowed to wait until there was a final decision on the jurisdictional question before being forced to attend to the discovery requests.

On February 7, 2003, the plaintiffs moved for an entry of default based on the defendants' failure to answer the amended complaint. Six weeks later, the district court denied the defendants' pending motion to reconsider the order compelling discovery. On April 11, the court held a hearing on the defendants' outstanding motion to reconsider its decision in *Ungar II*. The court indicated from the bench that it would deny both that motion and the concomitant request for a stay, but it did not actually enter such an order until April 22, 2003. Meanwhile, a magistrate judge entered the requested default, concluding that the defendants' failure to answer the amended complaint and their refusal to participate in discovery were the result of a deliberate strategic choice. The default was posted on the docket on April 21, 2003.

The defendants filed a notice of appeal to this court on April 23, 2003, in which they sought interlocutory review of both the lower court's decision in *Ungar II* and that court's refusal to reconsider that decision. They averred that they had been deprived of the opportunity to make a showing of sovereign immunity because the district court failed to take action on their motion for leave to assert a sovereign immunity defense, yet proceeded to determine that the defendants had no entitlement to immunity. We summarily affirmed the orders appealed from, noting that the defendants had neither moved to dismiss on the ground of sovereign immunity nor attempted, in the lower court, to make the evidentiary showing required to sustain such a defense.

Ungar v. Palestinian Liberation Org., 2003 U.S. App. LEXIS 27782, No. 03-1544, 2003 WL 21254790, at *1 (1st Cir. May 27, 2003) (per curiam) (unpublished). We added that the defendants' motion for leave to assert a defense was wholly gratuitous, as they did not need the court's permission to raise the sovereign immunity issue at that stage of the case. *See id.*

We issued our order without prejudice to the defendants' future efforts to press their newly asserted sovereign immunity defense in an appropriate fashion. *See id.* (admonishing that the defendants "must adhere to the rules that govern all litigants"). The next pleading, however, came from the plaintiffs, who moved for a default judgment. The defendants responded by filing their third motion to dismiss. This time, they predicated the motion on three bases, namely, (i) that the case centered around nonjusticiable political questions; (ii) that the defendants were entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611; and (iii) that section 2337(2) of the ATA, which provides that a suit under section 2333 may not be maintained against "a foreign state [or] an agency of a foreign state," independently divested the district court of jurisdiction.

The parties were like ships passing in the night. Pursuing the plaintiffs' path, the magistrate judge, on March 31, 2004, recommended the entry of default judgments against the PA and the PLO in amounts exceeding $116,000,000.[3] The

[3] The amounts differed slightly. The recommended judgment against the PA was for $116,421,048 and the recommended judgment against the PLO was for $116,415,468. The reasons for this minor disparity are not material to the issues on appeal.

defendants interposed timely objections to the report and recommendation, reasserting their nonjusticiability and sovereign immunity points and contending, for the first time, that they were entitled to a final determination on sovereign immunity (including appellate review) before being required either to answer the complaint or to submit to discovery.

Meanwhile, the district court had been pursuing the course charted by the defendants. On April 23, 2004, it denied the defendants' renewed motion to dismiss the amended complaint. *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164, 187 (D.R.I. 2004) (*Ungar III*). The court hewed to its earlier rejection of the defendants' nonjusticiability thesis. *See id.* at 173-74 (referencing *Ungar II*, 228 F. Supp. 2d at 44-47). Next, the court held that the FSIA and section 2337(2) of the ATA were two sides of the same coin with respect to sovereign immunity. *Id.* at 174-75. This left only a single question: "whether the PA and/or the PLO represent or constitute a foreign State and are thus entitled to sovereign immunity." *Id.* at 175. The court answered that question in the negative. *Id.* at 176-87. The plaintiffs immediately moved to amend the court's order pursuant to Fed. R. Civ. P. 59(e), arguing that the sovereign immunity defense had been waived. The defendants did nothing.

On July 12, 2004, the district court went down the plaintiffs' path. It adopted the magistrate judge's "default judgment" report and recommendation in its totality, overruled the defendants' objections thereto, and denied the plaintiffs' motion to amend *Ungar III*. *See Estates of Ungar v. Palestinian Auth.*, 325 F. Supp. 2d 15, 21-22, 26-28 (D.R.I. 2004) (*Ungar IV*). In the course of that decision, the court rebuffed the defendants' claim that they were entitled to a full review of their sovereign immunity defense before

being required to answer the complaint or proceed further. Id. at 23-24. The court then ordered judgment for the plaintiffs in the recommended amounts. *Id.* at 28. This appeal ensued.

II. JUSTICIABILITY

The defendants maintain that the complaint against them should have been dismissed because it presents a non-justiciable political question. We find this argument unconvincing.

In *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962), the Supreme Court provided guidance as to the attributes of a nonjusticiable political question. The Court explained that "it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.'" *Id.* at 210. Withal, not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Determining justiciability requires an "analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12. The Court then set forth six tests designed to confirm or negate the existence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

> discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court explained, in a later case, that "these tests are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 1776, 158 L. Ed. 2d 546 (2004).

The defendants assert with little elaboration that the central issue in this case fails each of the six tests. Most of their argumentation presumes that the district court intruded into forbidden territory when it interpreted an array of United Nations resolutions and Israeli-PLO agreements in a politically controversial manner. To this they add that the default judgment entered by the district court was so huge that it amounted to a political statement.

The defendants' position rests on a misunderstanding of the fundamental nature of this action. This is a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a legal remedy for injuries or death occasioned by acts of international terrorism. The defendants are organizations that allegedly violated the statute. They have attempted to avoid liability by wrapping themselves in the cloak of sovereign immunity. The question we must answer, then, is whether the defendants have set forth sufficient evidence to support their claim of immunity -- no more and no less.

On this view of the case, the plaintiffs easily clear the six *Baker* hurdles. To begin, the lower court's immunity decision neither signaled an official position on behalf of the United States with respect to the political recognition of Palestine nor amounted to the usurpation of a power committed to some other branch of government. After all, Congress enacted the ATA, and the President signed it. The very purpose of the law is to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime. [4] Seen in this light, the district court's decision denying immunity did not impede the constitutional prerogatives of the political branches over foreign policy. *See generally Baker*, 369 U.S. at 211 & n.31 (noting that the Constitution commits foreign relations to the executive and legislative branches, thus permitting them to determine what "may be done in the exercise of this political power").

The second and third *Baker* hurdles present no insuperable obstacles here. The district court had access to judicially manageable standards for resolving the issue before it, *see* infra Part III(A), and those standards did not require the court to make nonjudicial policy determinations. Both sides agreed

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[4] The FSIA operates in the same fashion. *See* 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."); H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 ("A principle purpose of [the FSIA] is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds . . . .").

that the definition of a "state" under the relevant statutes was informed by an objective test rooted in international law and articulated in the Restatement (Third) of Foreign Relations. Under these circumstances, the determination of whether the defendants have adduced sufficient evidence to satisfy that definition is quintessentially appropriate for a judicial body. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)

The final three hurdles need not concern us. These tests are "relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Id.* Here, the political branches have enacted a law that leaves undiminished their ability either to recognize or withhold recognition from foreign states, while leaving to the courts the responsibility of determining the existence vel non of statehood for jurisdictional purposes. Moreover, the district court's resolution of that question is not incompatible with any formal position thus far taken by the political branches. By the same token, its jurisdictional decision does not turn a blind eye to any position expressed by those responsible for conducting the nation's foreign relations. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 2255, 159 L. Ed. 2d 1 (2004) (noting that the State Department has retained authority to file "statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity"). As a result, the decision did not signify a lack of respect for, or conflict with, the wishes of the political branches. No more is exigible for this purpose. *See Baker*, 369 U.S. at 212-13 (endorsing judicial competence in matters touching on foreign relations in the absence of any "conclusive governmental action" or "recognizedly authoritative executive declaration") (citation and internal quotation marks omitted).

The defendants make a number of specific arguments, but these are largely derivative of their disagreement with the result reached by the district court. Their unhappiness is understandable, but legally irrelevant. The reality is that, in these tempestuous times, any decision of a United States court on matters relating to the Israeli-Palestinian conflict will engender strong feelings. Be that as it may, the capacity to stir emotions is not enough to render an issue nonjusticiable. For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones. *See Klinghoffer*, 937 F.2d at 49.

The one remaining argument that warrants particularized attention is the defendants' assertion that the district court made a political statement in calibrating the size of the award. That assertion is wholly unsupported. The judgment reflects the wrongful death of a youthful man and includes a trebling of damages as mandated by law. *See* 18 U.S.C. § 2333(a). It also includes attorneys' fees. *See id.* The defendants have not challenged either the measure of damages utilized by the lower court or the integrity of its mathematical computations. We add, moreover, that even if the court erred on the side of generosity -- a matter on which we take no view -- a mere error in the calculation of a damages award would not implicate the propriety of federal subject matter jurisdiction. We therefore reject the defendants' "political statement" assertion as meritless.

To say more on this aspect of the case would be supererogatory. The short of it is that the political question doctrine does not preclude judicial resolution of the plaintiffs' case. We turn, therefore, to the merits of the sovereign immunity defense.

III. SOVEREIGN IMMUNITY

We divide our discussion of the defendants' sovereign immunity defense into segments, starting with the legal framework and historical background. We then proceed to the merits.

A. The Legal Landscape.

The FSIA, with exceptions not relevant here, provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. Although the statute does not define the term "foreign state," it makes pellucid that the term includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603 (a). It also defines what constitutes an agency or instrumentality of a foreign state. *Id.* § 1603(b).

The ATA contains analogous language. It provides that no civil action thereunder may be maintained against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337(2). Like the FSIA, the ATA contains no definition of the term "foreign state."

Because the two statutory regimes use language that is similar but not identical, the first -- and most obvious -- question is whether there are substantive differences in the meaning of the term "foreign state" as used in the FSIA and the ATA, respectively. The district court concluded that the two statutes were to be read in pari materia. *See Ungar III*, 315 F. Supp. 2d at 175. We agree with that conclusion.

We recognize, of course, that even identical terms can have divergent meanings when used in different statutes. *See, e.g., Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1504 (1st Cir. 1989); *United States v. Sterling Nat. Bank & Trust Co.*, 494 F.2d 919, 923 (2d Cir. 1974). Generally speaking, however, that phenomenon occurs only when the purpose, history, and structure of the statutes make manifest a principled basis for interpreting the words differently. *See, e.g., Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002). Here, however, the Supreme Court has observed that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989). Nothing in either the language or legislative history of the ATA gives any indication that Congress intended the newer statute to supercede, rather than to mirror, the detailed jurisdictional framework described in the FSIA. To cinch matters, the Supreme Court, in a post-ATA case, recently repeated its admonition that "courts should decide claims of sovereign immunity in conformity with the [FSIA's] principles." *Altmann*, 124 S. Ct. at 2249. Consequently, we regard an assertion of sovereign immunity under the ATA, 18 U.S.C. § 2337(2), as being functionally equivalent to an assertion of sovereign immunity under the FSIA, 28 U.S.C. § 1604.

This brings a second question into focus. Since neither the FSIA nor the ATA define the term "foreign state" as it relates to a sovereign power, we must determine the intended meaning of that term. There is no controlling precedent in this circuit as to the essential attributes of statehood in this context. The parties, however, find common ground in their shared conviction that the definition should be derived by application of the standard set forth in the Restatement (Third)

of Foreign Relations. This standard deems a state to be "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Restatement (Third) of Foreign Relations § 201 (1987). Under the Restatement standard, political recognition -- typically thought of as "a formal acknowledgment by a nation that another entity possesses the qualifications for nationhood," *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 954 F.2d 847, 853 (2d Cir. 1992) -- is not a prerequisite to a finding of statehood. *See* Restatement (Third) of Foreign Relations § 202 cmt. b (explaining that "an entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states").

Using the Restatement standard as the rule of decision is a colorable position. In this regard, the Restatement tracks the historical standard found in international law. *See* Nat'l *Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988); *see also* Convention on Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25.[5] In addition, the FSIA's legislative history is itself replete with congressional references to sovereign immunity's roots in international law. *See, e.g.*, H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (noting that the objective of the bill was to codify sovereign immunity doctrine as recognized by international law and to ensure that this international standard would be applied in federal litigation).

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[5] The Montevideo Convention is still in effect and the United States is a party to it. *See* United States Dep't of State, *Treaties in Force* 480 (2004).

The legislative history goes on to recount that the very foundation of foreign sovereign immunity in federal jurisprudence rests on the Supreme Court's recognition of that doctrine in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812). There, the Court established that the federal courts generally have no jurisdiction over suits involving foreign sovereigns with whom the United States is at peace, deriving such an immunity from the custom and practice of international law. *Id.* at 135-46.

Over time, the federal courts came to rely less on international law and more on the actions of the State Department in determining whether to grant immunity in individual cases. H.R. Rep. No. 94-1487, at 8, *reprinted in* 1976 U.S.C.C.A.N. at 6606. The committee report that accompanied the FSIA noted that this practice was generally at odds with the views of the international community; indeed, in "virtually every country . . . sovereign immunity is a question of international law to be determined by the courts." *Id.* at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6607-08. To that end, Congress endeavored to bring the United States back into conformity with the world community by taking immunity decisions out of the hands of the executive branch and depositing them in the judicial branch. *Id.* at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6610. The committee report unequivocally restates the "central premise of the bill" as being that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which *incorporates standards recognized under international law*." *Id.* at 14, *reprinted in* 1976 U.S.C.C.A.N. at 6613 (emphasis supplied).

This legislative history offers strong support for the proposition that courts should look to international law to

determine statehood for purposes of the FSIA. The case law that has evolved in the lower federal courts, while scanty, pushes in the same direction. *See, e.g., Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237, 1243-47 (2d Cir. 1991) (using Restatement standard to determine whether Palau qualified as a foreign state); *Klinghoffer*, 937 F.2d at 47-49 (same with respect to PLO). Consequently, for purposes of this case, we accept the parties' agreement that the Restatement standard controls the statehood question.[6]

B. The Historical Background.

Following World War I, the League of Nations placed the region of Palestine, formerly a part of the Ottoman Empire, under a mandate. The mandate system grew out of the idea that some former colonies of nations defeated in World War I were "not yet able to stand by themselves" and should be

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[6] We caution that the Restatement standard, though embraced by both sides in this case, is not inevitably correct. It may be argued that a foreign state, for purposes of the FSIA, is an entity that has been recognized as a sovereign by the United States government. *See, e.g., Ungar III*, 315 F. Supp. 2d at 186-87 (alternate holding); *cf.* 13B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3604 (2d ed. 1984) (noting that for purposes of former 28 U.S.C. § 1332(a)(2)(1970) -- a statute modified by the FSIA -- federal courts generally had held that a foreign state was one that had been recognized as such by the United States government, in either a de jure or de facto capacity (collecting cases)). Here, however, all roads lead to Rome. The defendants' sovereign immunity defense fails the Restatement test. *See infra* Part III(C). If recognition were the test, the result would be the same. After all, the United States has not recognized Palestine as a sovereign nation. Thus, we need not probe the point too deeply.

placed under the tutelage of "advanced nations." League of Nations Covenant art. 22, paras. 1, 2. Palestine was among those territories deemed to "have reached a stage of development where their existence as independent nations [could] be provisionally recognized," subject to "administrative advice and assistance" from more mature governments. *Id.* at para. 4. The United Kingdom held the mandate over Palestine. Rather than "advice and assistance," however, the powers conferred were more akin to rule. Subject to implicit limitations not relevant here, the mandate gave the United Kingdom "full powers of legislation and of administration" over the region, as well as "control of the foreign relations of Palestine." *Mandate for Palestine* arts. 1, 12, League of Nations Doc. C.529 M.314 1922 VI (1922). The mandate also made the United Kingdom responsible for "placing [Palestine] under such political, administrative and economic conditions as will secure the establishment of the Jewish national home." *Id.* art. 2.

Heavy Jewish immigration to the region followed, owing in large part to the persecution of Jews in Europe. Tension between the Jewish and Arab populations led to violence and civil unrest. *See* United Nations Dep't of Pub. Info., The Question of Palestine & The United Nations at 3, U.N. Doc. DPI/2276, U.N. Sales No. 04.I.15 (2003) (Question of Palestine). By 1947, the United Kingdom's patience had worn thin. It took steps to divest itself of the mandate and dump the problem into the lap of the United Nations. *Id.*

The United Nations rose to the occasion. It formulated a plan that involved the creation of two independent states within the mandate territory: one Jewish, the other Arab. This plan also purposed to make Jerusalem an international enclave administered by the United Nations. *See Future Gov't of Palestine*, G.A. Res. 181(II), U.N. GAOR, 2d Sess., at 131,

U.N. Doc. A/519 (1947). The plan delineated the boundaries of the two states and the Jerusalem enclave, *id.* at 142-46; established a timetable for the withdrawal of British forces; and proposed to end the existing mandate no later than August 1, 1948. *Id.* at 132-33. As the British withdrew, power would temporarily vest in a United Nations commission pending the establishment of provisional governments by each of the two putative states. *Id.* at 133. At that point, the provisional governments would "progressively receive" full administrative responsibility. *Id.* at 134. When the independence of a state had "become effective," that state would be accorded "sympathetic consideration" for admission to the United Nations. *Id.* at 142.

The plan never took effect. Although Jewish leaders accepted it, Palestinian leaders did not. *See* Question of Palestine at 10. The Palestinians, still representing two-thirds of the population of the affected territory, argued vociferously against partition. *Id.* at 7, 10. Faced with a steadily deteriorating situation, the British abandoned the mandate and withdrew from the region. *Id.* at 11. On the same date -- May 14, 1948 -- Jewish leaders announced the establishment of the State of Israel, using the territorial boundaries delineated in G.A. Res. 181(II) to demarcate its borders. *Id.*

The next day, armed forces of the surrounding Arab states entered the former mandate territory. *Id.* The Arab League notified the U.N.'s Secretary-General that they intended to fill the vacuum left by the abrupt departure of the British forces and to restore law and order in the region. *See* United Nations, The Origins and Evolution of the Palestine Problem 137-38 (1990).

The Arab invasion precipitated the first Arab-Israeli war. Question of Palestine at 11. During the conflict, nearly three-

quarters of a million Palestinian refugees fled Israeli-controlled territory. *Id.* at 81. By the time of the eventual armistice, Egypt had taken control of the Gaza Strip, Jordan was in control of the West Bank (including East Jerusalem), and Israel had taken control of the remainder of the former mandate territory. *Id.* at 12.

This division persisted until 1967, when war again broke out between Israel, on the one hand, and Egypt, Jordan, and Syria, on the other hand. *Id.* at 18. Israel prevailed. Its spoils included occupation of the Gaza Strip and the West Bank, as well as the Sinai peninsula (previously under Egyptian rule) and the Golan Heights region of Syria. *Id.*

The U.N.'s Security Council attempted to undo these gains by diplomatic means. It issued a resolution that called for the "withdrawal of Israeli armed forces from territories occupied in the recent conflict" and beseeched the protagonists to respect and acknowledge "the sovereignty, territorial integrity and political independence of every State in the area." S.C. Res. 242, U.N. SCOR, 22d Sess., Resolutions and Decisions, at 8, U.N. Doc. S/INF/22/Rev.2 (1967). The document did not directly address the question of Palestine. The PLO, which had been formed in 1964, strongly criticized the resolution for that reason. Question of Palestine at 19.

In 1968, the PLO declared that the international community had failed to secure the rights of Palestinian Arabs and vowed to take up the struggle. *Id.* at 31. In 1973, a third Arab-Israeli war led the Security Council to renew its call for implementation of the terms of Resolution 242. *See* S.C. Res. 338, U.N. SCOR, 28th Sess., Resolutions and Decisions, at 10, U.N. Doc. S/INF/29 (1973). The following year, the United Nations General Assembly adopted two resolutions:

one affirming the rights of Palestinians to "self-determination without external interference" and to "national independence, and sovereignty," and the other granting the PLO observer status at the United Nations. G.A. Res. 3236 & 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974).

Over the next decade, the PLO provided municipal services to Palestinians in the West Bank and other refugee-dominated areas. By the early 1980s, these activities had put into place "an extensive rival bureaucratic structure." 25 *Encyclopaedia Britannica* 423 (15th ed. 2003). PLO attacks against Israel grew in intensity, eventually leading to Israel's invasion of Lebanon and the expulsion of a large PLO contingent. Question of Palestine at 26-28.

On July 31, 1988, Jordan gave up its claims to the West Bank. *See* Jordan: Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination, 27 I.L.M. 1637 (1988). Within a few weeks thereafter, the PLO, speaking from exile in Algeria, issued a "Declaration of Independence" that proclaimed the "establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem." Palestine Nat'l Council: Political Communique & Decl. of Indep., 27 I.L.M. 1660, 1670 (1988). In response, the United Nations decided to use the term "Palestine" instead of "Palestine Liberation Organization" within the United Nations system, but expressly stated that this redesignation did not enhance the group's observer status. G.A. Res. 43/177, U.N. GAOR, 43d Sess., Supp. No. 49, at 62, U.N. Doc. A/43/49 (1988).

In 1993, the United States helped to broker the first agreement between Israel and the PLO. Under its terms, Israel accepted the PLO as the representative of the

Palestinian people and the PLO acknowledged Israel's statehood. Question of Palestine at 47. This rapprochement culminated in the signing of the first of the Oslo Accords: the Declaration of Principles on Interim Self-Government Arrangements (DOP), Sept. 19, 1993, Isr.-P.L.O., 32 I.L.M. 1525. The DOP's stated purposes included the establishment of a Palestinian interim self-governing authority (the PA) as a precursor to a permanent arrangement based on Security Council Resolutions 242 and 338. *Id.* art. I, 32 I.L.M. at 1527. The DOP treated the West Bank and the Gaza Strip as a single territorial unit and stated that, when certain conditions had been achieved, Israel would transfer authority over "education and culture, health, social welfare, direct taxation, and tourism" in those areas to the PA. Id. art. VI, 32 I.L.M. at 1529. The DOP also set forth a framework for negotiating the structure of the PA. *Id.* art. VII, 32 I.L.M. at 1530-31. And, it specified that while the PA, when created, would be responsible for self-policing, Israel would remain responsible for external security (including the overall safety of Israelis), in the affected territory. *Id.* art. VIII, 32 I.L.M. at 1531.

The protagonists reached agreement as to the structure of the PA in 1994, and the PA then became a reality. *See* Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-PLO, art. IV, 33 I.L.M. 622, 628. On September 28, 1995, Israel and the PLO signed the interim agreement called for in the DOP, aspiring to reach a permanent agreement within five years. *See* Interim Agreement on the West Bank & the Gaza Strip, Sept. 28, 1995, Isr.-P.L.O., pmbl., 36 I.L.M. 551, 558. The interim agreement enumerated those powers and responsibilities to be transferred to the PA. For example, it granted executive responsibility to the PA with respect to "all matters within its jurisdiction," including the formulation of policies, the issuance of rules and

regulations, and the making of contracts. *Id.* art. IX, 36 I.L.M. at 560-61. The PA was, however, denied authority over foreign relations, including the establishment of embassies, the hiring of diplomatic staff, and the exercise of diplomatic functions.[7] *Id.* Moreover, the interim agreement took pains to note that Israel would "continue to exercise powers and responsibilities not so transferred." *Id.* art. I, 36 I.L.M. at 558.

The drafters of the interim agreement considered the West Bank and the Gaza Strip as a single territorial unit. Nevertheless, they subdivided the land within that unit into three main zones, each under a different level of PA control. *Id.* art. XI, 36 I.L.M. at 561-62. The overall framework required the PA to police the Palestinian populace but continued Israeli responsibility over external threats and border defense. *Id.* arts. XII-XIV, 36 I.L.M. at 562-63. Israel also retained jurisdiction over all Israeli settlers living in the territory. *Id.*

The PA's legislative powers were similarly restricted. The interim agreement specified that any law that "amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void *ab initio*." *Id.* art. XVIII, 36 I.L.M. at 564-65.

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[7] The interim agreement permitted the PLO to conduct limited foreign affairs activities on behalf of the PA. Those activities pertained only to economic, cultural, scientific, and educational matters. Interim Agreement on the West Bank & the Gaza Strip art. IX, 36 I.L.M. at 560-61.

In January of 1996, the PA held an election. Question of Palestine at 51. Negotiations on a permanent settlement began shortly thereafter, but terrorist attacks stalled the process. *Id.* at 51-52. The events giving rise to this case occurred during this period.

In August of 1998, the United Nations enhanced the PLO's observer status, granting it the right to participate in General Assembly debate, albeit without a vote. G.A. Res. 52/250, U.N. GAOR, 52d Sess., Supp. No. 49, at 4, U.N. Doc. A/52/49 (1998). That October, Israel and the PLO signed the Wye River Memorandum (a document expressly subject to the terms of both the DOP and the interim agreement). *See* Wye River Memorandum (Interim Agreement), Oct. 23, 1998, Isr.-P.L.O., 37 I.L.M. 1251. This marked a restarting of the peace process. The following year, the parties negotiated a similar sort of interim agreement. *See* Sharm El-Sheikh Memorandum, Sept. 4, 1999, Isr.-P.L.O., 38 I.L.M. 1465. In 2000, however, the two sides failed in an effort to reach a final agreement. Question of Palestine at 54. A firestorm of Palestinian attacks and Israeli reprisals ensued. *Id.* at 55.

In 2003, the Quartet -- a group comprised of representatives of the United States, the European Union, the Russian Federation, and the United Nations -- presented a "road map" setting forth a series of aspirational steps designed to break the impasse and move toward a permanent two-state solution in the region. *See Letter Dated 7 May 2003 from the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/2003/529 (2003).

To date, Israel and the PLO have not traveled down the newly mapped road. Peace negotiations have been virtually non-existent since 2000, and the violence continues. There is,

however, a glimmer of hope: the recent election of a new PA president has thawed relations between the two sides and created a sense of anticipation that a meaningful peace process will resume. *See* Steven Erlanger, *Abbas Declares War With Israel Effectively Over*, N.Y. Times, Feb. 14, 2005, at A1.

C. The Merits.

We now reach the merits of the sovereign immunity defense. In scrutinizing a district court's resolution of a foreign sovereign immunity issue, we review factual findings for clear error and legal conclusions de novo. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 80 (2d Cir. 2002). Here, the defendants' claim to sovereign immunity derives from their assertion that Palestine is a state, and the evidence presented to the district court in support of that assertion consisted entirely of indisputably authentic international legal documents. The district court's determination that Palestine was not a state was premised on a legal conclusion: the court determined that the defendants' documentary proffer did not satisfy the legal standard derived from international law. Our review of that decision is de novo. *Id.*

International law defines a state as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Restatement (Third) of Foreign Relations § 201. This definition derives from the Montevideo Convention of 1933. *See supra* Part III(A). In applying this definition, some courts have subdivided the analysis into four parts, asking whether the putative state (i) has a defined territory and (ii) a permanent population, which (iii) is under the control of its

own government, and (iv) has the capacity to engage in foreign relations. *See, e.g., Klinghoffer*, 937 F.2d at 47-48.

In practice, the third element is the most salient factor in the statehood calculus. *See Knox v. PLO*, 306 F. Supp. 2d 424, 434 (S.D.N.Y. 2004); *see also* James Crawford, The Creation of States in International Law 42 (1979) (Creation of States). The Restatement's explanation of this element is rather sparse; it notes only that "[a] state need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations." Restatement (Third) of Foreign Relations § 201 cmt. d. To satisfy these requirements, a state's government must, at a bare minimum, be independent and in general control of its territory, maintaining at least a modicum of law and order.[8] *See* Creation of States at 45-46; *see also* Nii Lante Wallace-Bruce, Claims to Statehood in International Law 54 (1994) (explaining that what is required "is a coherent system of authority structures regulating . . . the territory under that government's control"). In short, the existence of a state demands a community integrated and organized as a political unit. *See* 1 Robert Jennings & Arthur Watts, Oppenheim's International Law 122 (9th ed. 1992). Its government must speak for the state as a whole; the mere presence of independent tribes or factions within a territory, lacking common institutions, cannot constitute a government in control. *See Western Sahara*, 1975 I.C.J. 12, 63 (Oct. 16).

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[8] Of course, if statehood exists at a finite point in time, it is not terminated by belligerent occupation, without more. *See* Restatement (Third) of Foreign Relations § 201, reporter's note 3 (explaining that "military occupation, whether during war or after an armistice, does not terminate statehood").

The first, second, and fourth elements are dependent on (or, sometimes, subsumed by) the third. As to the first -- defined territory -- the "only requirement is that the State must consist of a certain coherent territory effectively governed." Creation of States at 40. As such, this element is merely a function of independence and governmental control. *Id.* So too the second element, which typically is satisfied by showing a permanent population within the defined territory. *See id.* at 40-42. The relationships of these elements with the all-important third element is readily evident. As one court put it, the question is essentially whether the entity claiming statehood has a "defined territory *under its control*" and a "permanent population under its control." *Knox*, 306 F. Supp. 2d at 434 (emphasis in original).

The fourth element -- "capacity to engage in foreign relations" -- focuses on "competence, within [a state's] own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so." Restatement (Third) of Foreign Relations § 201 cmt. e. Again, this is a function of independence and effective government control. *See* Creation of States at 47-48. In that sense, then, it too is dependent on the third element.

We add that the party who alleges sovereign immunity has the burden of proving that status. *See Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers*, 12 F.3d 317, 325 (2d Cir. 1993); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983). With this in mind, we move from the general to the specific.

The defendants argue that the state of Palestine exists; that they constitute core elements of that state; and that, therefore, they are immune from suit under the FSIA (and, thus, under

the ATA). This argument has a quicksilver quality: it is hard to pin down exactly when or how the defendants assert that Palestine achieved statehood. At various points in their briefs, they hint at three possibilities: (i) the period from the beginning of the mandate through the 1967 Arab-Israeli war; (ii) the period from the end of that war up until the creation of the Palestinian Authority (1994); and (iii) the period from 1994 forward. In an abundance of caution, we consider whether the defendants have made a prima facie showing of statehood at any such juncture.

For each of the three periods, the defendants' proffer is much the same anent the first and second elements of the test for statehood. With respect to the first, the defendants consistently claim that Palestine comprises the territory defined by Security Council Resolution 242, that is, those portions of the once and former mandate territory occupied by Israel during the 1967 war (including the West Bank, the Gaza Strip, and East Jerusalem). With respect to the second element, the defendants asseverate that this territory has had a permanent population from time immemorial (and, thus, that it had such a population throughout the three periods with which we are concerned). Assuming, arguendo, the accuracy of these averments, the focus shifts to the third prong of the test for statehood. At that stage, the question becomes whether the defendants have shown that the identified territory and population are self-governing. In answering this question, we look separately at each period.

1. The Initial Period. As to the pre-1967 period, the defendants' argument seems to be that the territory that comprised the Palestinian portion of the mandate was a state prior to, during, and after the mandate. Their support for this thesis is very weak; they assert only that throughout this

interval there were local governmental institutions in place that catered to the Palestinian populace.

This assertion is manifestly insufficient to make the defendants' prima facie case of statehood. The third element of the test requires governmental independence and control of a defined territory. That element plainly was not satisfied while the defined territory was part of the Ottoman Empire; even if the Palestinian people exercised operating control over domestic governmental functions in the region -- and the defendants offer nothing to support such a claim -- that would not be sufficient to show the existence of an independent political unit that *controlled* the territory.

The same is true for the latter portions of the period. During the currency of the mandate, the United Kingdom exercised suzerainty over the administration and laws of the defined territory. *See Klausner v. Levy*, 83 F. Supp. 599, 600 (E.D. Va. 1949). Following the United Kingdom's relinquishment of the mandate and the onset of the 1967 Arab-Israeli war, the Israelis occupied much of the land designated for a future Arab state, and the Egyptians and Jordanians seized the rest. The net result is that, at all times, other states had control over the defined territory.

The defendants resist the obvious conclusion. In particular, they rely upon United Nations General Assembly Resolution 181(II), noting that it called for an independent Arab state to come into existence no later than October 1, 1948, and that this became a reality in the sense that "Palestinian government institutions continued to function under Egyptian and Jordanian occupation much as they had under the Mandate." Appellants' Br. at 21. These assertions are insufficient to show that a political unit was in control of the defined territory and populace. The mere fact that the

United Nations conceived of a paln for Palestinian statehood --a plan that the United Nations was unable to implement does not establish the existence of a state. Nor does the fact that the Egyptians and Jordanians occupied and controlled a significant portion of the defined territory immediately following the end of the mandate aid the defendants' cause. To the contrary, the fact is a stark reminder that no state of Palestine could have come into being at that time. *See Knox*, 306 F. Supp. 2d at 437 (noting that under "international law, a state will *maintain* its statehood during a belligerent occupation . . . but it would be anomalous indeed to hold that a state may *achieve* sufficient independence and statehood in the first instance while subject to and laboring under the hostile military occupation of a separate sovereign").

2. The Middle Period. The interval following the occupation of the West Bank and the Gaza Strip by Israel in 1967 is no more promising. With respect to this time span, the defendants rely heavily on Security Council Resolution 242 and its call for Israeli withdrawal from "territories occupied in the recent conflict" and for all states to respect and acknowledge "the sovereignty, territorial integrity and political independence of every State in the area." That reliance is mislaid. There is a vast difference between what should be and what is; the fact that some political leaders recognize that particular territory should comprise a state does not make that territory a state under the prevailing principles of international law.

What counts is that the defendants have not presented any evidence indicating that Palestine actually became a state following Israel's conquest of the lands previously occupied by Jordan and Egypt. The one circumstance to which the defendants advert -- that the Israelis did not dismantle the local governmental institutions in the region -- is wholly

inadequate to show that there was a Palestinian state underlying the Israeli occupation. The territory went directly from Jordanian/Egyptian control to Israeli control, thus undermining the defendants' statehood argument. *See id.*

To be sure, the defendants point proudly to the U.N.'s 1974 recognition of the PLO. We do not minimize the political significance of that event. The fact remains, however, that neither political recognition of the PLO nor United Nations support for self-governance is sufficient to signify that the Restatement's conditions for statehood have been met. *See Klinghoffer*, 937 F.2d at 48 (noting that the PLO did not satisfy the objective requirements for statehood despite its political recognition by some foreign states).

3. The Most Recent Period. The defendants' argument for current statehood posits that Palestine's changing status over the last decade marked the emergence of the defined territory from Israeli control and the establishment of a Palestinian government in its place. The PLO's 1988 declaration of independence adumbrated the inception of this period. The period itself commenced, however, in 1994, the signal event being the creation of the PA as an entity having some lawful authority in the West Bank and Gaza. The defendants suggest that this development signified the birth of a government sufficiently in control of the defined territory to satisfy the third element of the Restatement test. We reject the suggestion.

Undoubtedly, the agreements to which the defendants allude vested some autonomy in the newly created PA. But the authority so transferred was limited and, during and after that transition, Israel explicitly reserved control over all matters not transferred. *See* Interim Agreement art. I, 36 I.L.M. at 558. Several of these reserved powers are

incompatible with the notion that the PA had independent governmental control over the defined territory. To illustrate, the interim agreement expressly denied the PA the right to conduct foreign relations, *id.* art. IX, 36 I.L.M. at 561; left Israel with an undiminished ability to defend and control the territorial borders, *id.* art. XII, 36 I.L.M. at 562; denied the PA the right to create or maintain either an army or a navy,[9] *id.* art. XIV, 36 I.L.M. at 563; retained Israeli control over the territorial airspace, *id.* at Annex I, art. XIII, 36 I.L.M. at 586; and placed severe restrictions on the PA's lawmaking ability (declaring, inter alia, that any laws passed in contravention of the DOP would be void ab initio), *id.* art. XVIII, 36 I.L.M. at 565. These restrictions remain in effect. It is, therefore, transparently clear that the PA has not yet exercised sufficient governmental control over Palestine to satisfy the third element of the Restatement test. *See* Geoffrey R. Watson, The Oslo Accords 68-72 (2000) (concluding that "there was no Palestinian state at the time of the signing of the Interim Agreement"); D.J. Harris, Cases and Materials on International Law 226 (5th ed. 1998) (concluding that the interim agreement "falls short of [achieving] statehood for the Palestinian people"); United Nations Comm'n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine* at 12, U.N. Doc. E/Cn.4/2001/121 (2001) (noting that, as of 2001, Palestine "still falls short of the accepted criteria of statehood").[10]

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[9] The PA was permitted to organize a police force, but this force had no jurisdiction over Israeli citizens within the territory. *See* Interim Agreement at Annex I, art. XI, 36 I.L.M. at 585.

[10] Indeed, this conclusion dovetails with the conclusion reached by a prominent legal advisor to the PLO during the 1999-2000 peace talks. *See* Omar M. Dajani, *Stalled Between Seasons: The*

The defendants do not deny that these limitations are incompatible with statehood, but, rather, contend that they were imposed by force and that the Israeli occupation is all that is preventing the full exercise of the prerogatives of statehood. The problem with this contention is that it presupposes that Palestine was a state *before* the Israeli occupation -- and the defendants have not shown that it was. *See Knox*, 306 F. Supp. 2d at 437.

We recognize that the status of the Palestinian territories is in many ways sui generis. Here, however, the defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time. In view of the unmistakable legislative command that sovereign immunity shall only be accorded to states -- a command reflected in both the FSIA and the ATA -- the defendants' sovereign immunity defense must fail.

IV. THE DEFAULT JUDGMENT

We come now to the defendants' protest that they were entitled to a final determination on the sovereign immunity question (including appellate review) before they could be required to bear any of the burdens of litigation. In mounting this protest, the defendants place great weight on *In re Papandreou*, 329 U.S. App. D.C. 210, 139 F.3d 247 (D.C. Cir. 1998). There, the Greek governmental entities and

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International Legal Status of Palestine During the Interim Period, 26 Denv. J. Int'l L. & Pol'y 27, 86 (1997) (remarking that "the interim character and extraordinarily limited powers of the PA make it impossible to characterize that body as the 'effective government' of the [territory]"; *see* also Omar Dajani, *On a Better Road This Time in the Mideast?*, Wash. Post, May 4, 2003, at B1.

officials moved to dismiss claims against them on grounds of lack of in personam jurisdiction, forum non conveniens, and sovereign immunity. *Id.* at 249. The plaintiffs sought discovery for the limited purpose of determining whether FSIA's "commercial activity" exemption applied. *See* 28 U.S.C. § 1605(a)(2). The defendants objected and asked the district court to adjudicate their other non-merits-based defenses before allowing any discovery. *Papandreou*, 139 F.3d at 254. The district court authorized the jurisdictional discovery, including the depositions of several Greek cabinet ministers. *Id.* at 249. The defendants petitioned for a writ of mandamus and the court of appeals obliged. The court held (i) that there were less intrusive ways of determining the applicability of the FSIA exemption, and (ii) that the trial court should have grappled with the non-merits-based defenses before subjecting the defendants to jurisdictional discovery. *Id.* at 254.

We do not lightly dismiss the reasoning behind *Papandreou*. Had the defendants in this case raised their sovereign immunity defense in a timely manner, their argument that they were entitled to adjudication of that defense before proceeding with the merits of the litigation might have some force. After all, a district court's denial of a motion to dismiss a complaint on the ground of foreign sovereign immunity is immediately appealable under the collateral order doctrine. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 363 U.S. App. D.C. 404, 389 F.3d 192, 196 (D.C. Cir. 2004); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1295 (11th Cir. 2000); *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 387 (2d Cir. 2000); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 325 U.S. App. D.C. 117, 115 F.3d 1020, 1025 (D.C. Cir. 1997). And such an appeal ordinarily divests the district court of jurisdiction to

proceed with the litigation pending its resolution. *See Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 93 (1st Cir. 2003); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989); *see also Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 175 (E.D. Va. 1993) (noting that foreign state's non-frivolous interlocutory sovereign immunity appeal divests district court of jurisdiction).

These principles are not absolute. None of the cited cases stand for the proposition that sovereign immunity is a trump card that may be held in reserve until a defendant sees fit to play it, thus enabling the defendant to stop the litigation in its tracks at a time of its choosing. That is simply not the law. As we have explained in a related context, "in exchange for the defendant's right to interrupt the judicial process, the court may expect a reasonable modicum of diligence in the exercise of that right." *Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 668-69 (1st Cir. 1996) (quoting *Kennedy v. City of Cleveland*, 797 F.2d 297, 301 (6th Cir. 1986)). Demanding such diligence is "virtually essential to orderly judicial management of the vexing procedural problems" that

accompany assertions of immunity.[11] *Fisichelli v. City Known as Town of Methuen*, 884 F.2d 17, 19 (1st Cir. 1989).

The defendants, for whatever reason, elected not to assert sovereign immunity in either of their first two motions to dismiss. By the time that the district court ordered the entry of a default, the defendants still had not moved to dismiss on the ground of sovereign immunity. The district court found, and the defendants' own words appear to confirm, that this recalcitrance was intentional and designed to accomplish some obscure strategic aim. *See Ungar IV*, 325 F. Supp. 2d at 23-24.

Given this sequence of events, the defendants' arguments are unpersuasive. Here, as contemplated in *Papandreou*, discovery was stayed until the defendants had a full determination of the non-merits-based defenses that they initially chose to assert (including insufficiency of process, forum non conveniens, and lack of in personam jurisdiction). After rejecting those defenses and denying two motions to dismiss, the district court in effect ordered the litigation to

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[11] Of course, an entity alleging an entitlement to sovereign immunity may choose to ignore an action or court order directed at it, accept a default, and then assert its immunity at a later state of the litigation. But such a choice represents a rather risky gamble. If the assertion of immunity is valid, the defendant wins the entire pot (i.e., it walks away from the suit unscathed) but if the assertion of immunity fails, the defendant loses outright (i.e., it must live with the default). There is no need to engage in such high-stakes wagering. A defendant may both assert sovereign immunity and defend on the merits. *See MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 662 (5th Cir. 1996); *Practical Concepts, Inc. v. Republic of Bolivia*, 258 U.S. App. D.C. 354, 811 F.2d 1543, 1547 (D.C. Cir. 1987).

proceed. The defendants -- who to that point had not raised a sovereign immunity defense -- nonetheless refused either to answer the amended complaint or to comply with the court's discovery orders. In view of this history, we believe that the district court acted well within the encincture of its discretion in entering the default. *See Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951-52 (11th Cir. 1996) (permitting entry of default against foreign state due to its willful failure to comply with court orders). The defendants deliberately chose to hold off on asserting a sovereign immunity defense -- and they must live with the consequences of that choice.[12]

V. CONCLUSION

We need go no further. The defendants have not shown that this case involves nonjusticiable political questions. By like token, they have not shown that Palestine is a state and, as a consequence, they do not have available to them the buckler of sovereign immunity. Consequently, they cannot set aside the judgment on that ground. And, finally, they have failed to show that the district court acted precipitously either

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[12] We recognize, of course, that the existence vel non of foreign sovereign immunity implicates federal subject matter jurisdiction. Thus, the failure to raise the defense in a timely manner cannot result in a waiver. *See, e.g., Haven v. Polska*, 215 F.3d 727, 733 (7th Cir. 2000). Nevertheless, a failure of that kind can appropriately affect the trial court's management of the litigation. *See, e.g., Bolduc v. United States*, 402 F.3d 50, 54, 2005 U.S. App. LEXIS 4718 (1st Cir. 2005) [No. 03-2081, slip op. at 9] (explaining that "the belated filing of a motion to dismiss for want of subject matter jurisdiction can have consequences in terms of a court's case-management decisions"). That is the situation here.

in entering a default or in reducing the default to judgment. Accordingly, we reject their appeal.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

04-2079

EFRAT UNGAR ET AL.,	)
Plaintiffs, Appellees,	)
	)
v.	)
	)
THE PALESTINE LIBERATION	)
ORGANIZATION ET AL.,	)
Defendants, Appellants.	)
	)

ERRATA SHEET

The opinion of this Court issued on March 31, 2005 is corrected as follows:

On page 37, line 24 through page 38, line 1, replace the phrase "an aspirational plan for Palestinian statehood" with the phrase "of a plan for Palestinian statehood - a plan that the United Nations was unable to implement-"

On page 38, line 16, delete the word "hortatory"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

03-1544

[Filed, May 27, 2003]

EFRAT UNGAR, by and through	)
the Administrator of his Estate,	)
David Strachman; DVIR UNGAR,	)
by his guardians and next friend	)
Prof. Meyer Ungar, et al.;	)
YISHAI UNGAR, a minor, by	)
his guardians and next friend	)
Prof. Meyer Ungar, et al.;	)
MEYER UNGAR, Professor,	)
individually and in his capacity	)
of legal guardian of Dvir	)
and Yishai Ungar; JUDITH	)
UNGAR, individually and in	)
her capacity of legal guardian to	)
Dvir and Yishai Ungar; URI D	)
ASBERG, Rabbi, individually	)
and in his capacity as legal	)
guardian of Dvir and Yishai	)
Ungar; JUDITH DASBERG,	)
individually and in her capacity	)
as legal guardian to Dvir	)
and Yishai Ungar; AMICHAI	)
UNGAR; DAFNA UNGAR;	)
MICHAL COHEN; YARON	)
UNGAR, by and through the	)
Administrator of his Estate,	)
David Strachman,	)
Plaintiffs - Appellees	)

v.

THE PALESTINIAN LIBERATION ORGANIZATION; THE PALESTINIAN AUTHORITY, a/k/a The Palestinian Interim Self-Government Authority,
Defendants - Appellants.

YASSER ARAFAT; JIBRIL RAJOUB; MUHAMMED DAHLAN; AMIN AL-HINDI; TAWFIK TIRAWI; RAZI JABALI; ABDEL RAHMAN ISMAIL A.R. GHANIMAT; JAMAL ABDEL F. AL-HOR; RAED FAKHRI ABU HAMDIYA; IBRAHIM GHANIMAT; MUHMUD HASSAN KAFISHE IMAN; HAMAS-ISLAMIC RESISTANCE MOVEMENT, a/k/a/Harakat Al-Mugaqama Al-Islamiyya,
Defendants

OPINION

JUDGMENT filed Judge Bruce M. Selya, Judge Kermit V. Lipez, Judge Jeffrey R. Howard. We agree with appellees that, on the present record, this appeal is devoid of merit. Accordingly, we bypass the jurisdictional question, *see, e.g.*,

United States v. Woods, 210 F.3d 70, 74 & n.2 (1st Cir. 2000), grant the appellees' motion for summary disposition, and summarily affirm. The appellants allege an entitlement to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1604, and the counterpart provision in the Antiterrorism Act of 1991, 18 U.S.C. § 2337(2). Yet "the party claiming PSIA immunity bears the initial burden of proof of establishing a prima facie case that it satisfies the FSIA's definition of a foreign state." *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *accord, e.g., Virtual Countries, Inc. v. Repub. of S. Africa*, 300 F.3d 230, 241 (2d Cir. 2002); *Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002). Here, the appellants have not attempted to make such an evidentiary showing. To be sure, the appellants complain that they were deprived of an opportunity to make a proper showing by the district court. In particular, they complain that the court's handling of the immunity issue - withholding action on their motion for "leave to assert" such a defense, stating during a hearing that immunity was not then being considered, and thereafter deciding the issue - took them by surprise. This procedural objection rings hollow. The appellants had ample opportunity to file a properly supported motion under Fed. R. Civ. p. 12(b) (1) seeking dismissal on sovereign immunity grounds. They did not need leave of court to file such a motion and assert such a defense. Indeed, they did just that, through the same counsel, in unrelated litigation thirteen years ago. *See Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 856-58 (S.D.N.Y. 1990), vacated on other grounds, 937 F.2d 44 (2d Cir. 1991) . That course of conduct belies their present complaint. We need go no further. Given the bare record, the appellants cannot prevail on this appeal. Of course, they have not yet answered the complaint, and we do not discount the fact that they may still be able to file a properly supported Rule 12(b) (1) motion

below. This seems especially likely given the jurisdictional implications of the issue and the appellees' characterization of the court's immunity ruling as "interlocutory." But the appellants must adhere to the rules that govern all litigants. The motion for summary disposition is allowed and the orders appealed from are summarily affirmed. See Loc. R. 27(c). This order is without prejudice to the appellants raising their sovereign immunity defense in a proper and timely manner. We take no view as to the merits of that defense. So ordered. [03-1544] (lina)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A.No. 00-105L

[Filed July 12, 2004]

THE ESTATES OF YARON	)
UNGAR AND EFRAT UNGAR	)
BY AND THROUGH THE	)
ADMINISTRATOR OF	)
THEIR ESTATES DAVID	)
STRACHMAN; DVIR	)
UNGAR, MINOR, BY HIS	)
GUARDIANS AND NEXT	)
FRIEND, PROFESSOR	)
MEYER UNGAR; JUDITH	)
UNGAR; RABBI URI	)
DASBERG; JUDITH DASBERG	)
(INDIVIDUALLYAND IN THEIR	)
CAPACITY AS LEGAL	)
GUARDIANS OF PLAINTIFFS	)
DVIR UNGAR AND YISHAI	)
UNGAR); AMICHAI UNGAR;	)
DAFNA UNGAR; AND MICHAL	)
COHEN,	)
Plaintiffs,[1]	)

[1] On July 24, 2001, this Court dismissed all claims arising out of Efrat Ungar's death because they were brought under 18 U.S.C. § 2333, and the Complaint did not allege that Efrat Ungar was an American national. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 97 (D.R.I. 2001) (hereinafter, *Ungar I*). This included the claims of Efrat Ungar's Estate, those filed by Rabbi Uri Dasberg and Judith Dasberg in

v.)
)
THE PALESTINIAN)
AUTHORITY (A.K.A."THE)
PALESTINIAN INTERIM SELF-)
GOVERNMENT)
AUTHORITY"); THE)
PALESTINE LIBERATION)
ORGANIZATION; YASSER)
ARAFAT; JIBRIL RAJOUB;)
MUHAMMED DAHLAN;)
AMIN AL-HINDI; TAWFIK)
TIRAWI; RAZI JABALI;)
HAMAS – ISLAMIC RESIST)
ANCE MOVEMENT (A.K.A.)
"HARAKAT AL-)
MUQAWAMA AL-ISLAMIYYA")
ABDEL RAHMAN ISMAIL)
ABDEL RAHMAN GHANIMAT;)
JAMAL ABDEL FATAH)
TZABICH AL HOR; RAED)
FAKHRI ABU HAMDIYA;)
IBRAHIM GHANIMAT; AND)
IMAN MAHMUD HASSAN)
FUAD KAFISHE,)
Defendants.[2])

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their individual capacities, and claims on behalf of Davir and Yishai Ungar. *Id.*

[2] On July 24, 2001, this Court dismissed Defendants Yasser Arafat, Jibril Rajoub, Muhammed Dahlan, Amin Al-Hindi, Twfik Tirawi, and Razi Jabali due to a lack of personal jurisdiction. *Ungar I*, 153 F. Supp. 2d at 100. Similarly, on January 27, 2004, this Court dismissed Defendants Abdel Rahman Ismail Abdel Rahman

_____)

MEMORANDUM AND ORDER

Ronald R. Lagueux, Senior United States District Judge

There are three matters before this Court: 1) the objections filed by Defendants, the Palestinian Authority ("PA"), and the Palestine Liberation Organization ("PLO"), to a Report and Recommendation issued by Magistrate Judge David L. Martin on March 31, 2004 ("Report and Recommendation"); 2) the PA's appeal of a separate Order issued by Judge Martin granting Plaintiffs' request for attorneys' fees as a sanction for the PA's failure to provide any discovery in the instant case; and 3) Plaintiffs' motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter and amend this Court's April 23, 2004 Decision and Order relating to sovereign immunity. *The Estates of Yaron Ungar ex rel Strachman v. The Palestinian Authority*, 315 F. Supp. 2d 164 (D.R.I. 2004) (hereinafter, *Ungar IV*).

The facts of this case are described at length in this writer's previous opinions. *See Ungar IV*, 315 F. Supp. 2d at 168-171; *Estates of Yaron Ungar v. Palestinian Auth., Ungar*

Ghanimat, Jamal Abdel Fatah Tzabich Al Hor, Raed Fakhri Abu Hamdiya, Ibrahim Ghanimat, and Iman Mahmud Hassan Faud Kafishe due to a lack of personal jurisdiction. *Estates of Ungar ex rel. Strachman v. Palestinian Authority*, 304 F. Supp. 2d 232, 241 (D.R.I. 2004) (hereinafter, *Ungar III*). This Court also entered final judgment against Defendant, Hamas - Islamic Resistence Movement (A.K.A. "Harakat Al-Muqawama Al-Islamiyya") for a total amount of $116,409,123.00 plus attorneys' fees and court costs. *Id.* at 242-43.

III, 304 F. Supp. 2d 232 at 244-47; *The Estates of Ungar ex rel. Strachman v. The Palestinian Auth.*, 228 F. Supp. 2d 40, 41-43 (D.R.I. 2002) (hereinafter, *Ungar II*); *Estates of Ungar v. Palestinian Auth.*, *Ungar I*, 153 F. Supp. 2d 76 at 82-85; and the attached Report and Recommendation. Therefore, there is no need to repeat the tragic events and extensive procedural history underlying this litigation. It suffices to say here that on April 29, 2003, this writer referred Plaintiffs' three motions for default judgment against the PA and PLO to Magistrate Judge David L. Martin for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 32(a). Judge Martin held hearings on the motions last summer and took the matters under advisement.

Judge Martin reviewed the submitted memoranda and exhibits, performed independent research, and then issued an extensive Report and Recommendation on March 31, 2004, which is attached hereto. Judge Martin recommended that this Court enter default judgment against the PA in the amount of $116,421,048.00 and against the PLO in the amount of $116,415,468.00. Both recommended amounts include attorneys' fees.

The PA and PLO filed objections to Judge Martin's Report and Recommendation on April 19, 2004, before the time period for filing objections set forth in Rule 72(b) of the Federal Rules of Civil Procedure and Local Rule 32 elapsed later that day. The PA and PLO assert the following six grounds for their objections: 1) this Court lacks subject matter jurisdiction because the PA and PLO are entitled to sovereign and governmental immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1976) ("FSIA"), and the Anti-Terrorism Act of 1991, 18 U.S.C. § 2337(2) (1992)

("ATA"),[3] and because the claims asserted against them present non-justiciable political questions; 2) Plaintiffs' claims are legally insufficient and do not support an entry of default judgment; 3) the Report and Recommendation fails to give effect to the PA's and PLO's position that they are entitled to a final determination of their claims to sovereign immunity, including appellate review, before being required to answer the Amended Complaint or participate in discovery; 4) the Report and Recommendation fails to recognize and give effect to the adverse conditions facing the Palestinian government and the PA and PLO, which have made discovery difficult and contrary to Palestinian national interests; 5) this Court lacks personal jurisdiction over the PA and PLO; and 6) the law should not require the "disproportionate compensation" recommended by Judge Martin. Objections of Defs. Palestinian Auth. & Palestine Liberation Organization to the Mag. Judge's Report & Recommendation, (hereinafter, Objections), at 1-3. That same day, the PA appealed Judge Martin's March 31, 2004 Order that granted Plaintiffs' request for attorneys' fees pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure as a sanction for the PA's failure to provide any discovery in the instant case. The PA's arguments with respect to this appeal are identical to its objections to the Report and Recommendation. *See* Notice of Appeal, at 2.

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[3] Congress originally enacted Sections 2331-2338 as part of the Antiterrorism Act of 1990. Pub.L. No. 101-519, § 132, 104 Stat. 2250-2253 (1990). However, that Public Law has no currently effective sections. Congress re-enacted these sections as part of the Federal Courts Administration Act of 1992. Pub.L. No. 102-572, Title X, § 1003(a)(1) - (5), 106 Stat. 4521-4524 (1992), which was amended on October 31, 1994 to Pub.L.No. 103-429, § 2(1), 108 Stat. 4377. *Ungar II*, 228 F. Supp. 2d at 41 n.1.

Also on April 19, 2004, Plaintiffs filed their own objections to the Report and Recommendation. Plaintiffs later withdrew these objections so as not to impede this Court from entering a final judgment. Notice of Withdrawal of Pls.' Objections to Portions of the Report & Recommendation Issued on Mar. 31, 2004, at 2. Thereafter, Plaintiffs responded to the PA's and PLO's objections and argued that the objections did not present anything new and were "hopelessly vague, frivolous, or irrelevant." Pls.' Resp. to Objections of the Palestinian Auth. & Palestine Liberation Organization to the Mag. Judge's Report & Recommendation, at 1. Plaintiffs requested that this Court make a de novo determination that rejects each of the objections, adopts the Report and Recommendation, and enters a final judgment against the PA and PLO. *Id.* at 2.

On April 27, 2004, Plaintiffs filed a motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter and amend this Court's Decision and Order in *Ungar IV* regarding sovereign immunity. 315 F. Supp. 2d at 164. Plaintiffs request that this Court reconsider and reverse its holding that the PA and PLO did not waive claims to sovereign immunity, and hold instead that "even assuming *arguendo* that Defendants were 'foreign States,' they have waived any claims to sovereign immunity." Mem. in Supp. of Pls.' Mot. Pursuant to Fed. R. Civ. P. 59(e), at 4. The PA and PLO did not file any objections to Plaintiffs' motion.

The parties briefed and later argued these three matters on June 23, 2004, and they are now in order for decision. For the reasons that follow, this Court overrules each of the PA's and PLO's objections to Judge Martin's Report and Recommendation, adopts that Report and Recommendation in toto and attaches it hereto. The PA's appeal of Judge Martin's separate Order with respect to Plaintiffs' request for

attorneys' fees and Plaintiffs' motion to amend this Court's decision in *Ungar IV* are denied. Furthermore, this Court directs the Clerk to enter default judgment against the PA and PLO as indicated below.

The Objections to the Report and Recommendation

The PA and PLO raise six objections to Judge Martin's recommendation that this Court grant Plaintiffs' motions to enter default judgment. Since these motions are dispositive of the claims presented in the Amended Complaint, this Court must conduct a de novo review of Judge Martin's Report and Recommendation. *See Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 2004 U.S. Dist. LEXIS 9399, No. 02-354L, 2004 WL 1166500 at *4 (D.R.I. May 26, 2004) (noting that a dispositive motion is one that extinguishes a party's claim or defense and is reviewed by a district court de novo where that court may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions). Therefore, although the PA and PLO do not present this Court with any new arguments, this writer will consider each objection in turn.

The PA's and PLO's first objection is that this Court lacks subject matter jurisdiction over the Amended Complaint due to the existence of non-justiciable political questions and the sovereign immunity provided in Section 2604 of the FSIA [4]

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[4] 28 U.S.C. § 2604 has been repealed. The defense of sovereign immunity provided for in the FSIA is now codified at 28 U.S.C. § 1604 (1976), which provides, in part, that "a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

and Section 2337(2) of the ATA.[5] Objections, at para. 1. The PA and PLO raised and this Court rejected the same arguments in *Ungar II* and *Ungar IV* and does so again now. For the reasons set forth in those opinions, this writer reiterates that the Amended Complaint does not present any non-justiciable political questions and neither the PA, the PLO, nor the entity called Palestine is or represents a foreign State and therefore, is not entitled to sovereign immunity. *See Ungar IV*, 315 F. Supp. 2d at 174-187; *Ungar II*, 228 F. Supp. 2d at 44-49. Therefore, the PA's and PLO's first objection to the Report and Recommendation is overruled.

The second objection raised by the PA and PLO is that this Court should not enter a default judgment because Plaintiffs' claims are legally insufficient. Objections, at para. 2. The PA and PLO argue that they "legitimately sought to protect and promote Palestinian interests" and lacked the intent required to engage in acts of international terrorism as defined by the ATA.[6] *Id.* Furthermore, these Defendants

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[5] Section 2337(2) of the Anti Terrorism Act states that "no action shall be maintained under Section 2333 against a foreign state, an agency of a foreign state, an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337(2).

[6] Section 2331(1) of the ATA defines the term international terrorism to mean activities that:

> A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> B) appear to be intended -

argue that their conduct was not proximately related to Yaron Ungar's murder. *Id.*

Similar to their claims to sovereign immunity, the above are arguments that should have been raised in an answer to the Amended Complaint or through Defendants' participation in the present litigation. However, these Defendants decided and instructed their counsel not to answer the Amended Complaint or participate in discovery and therefore, were defaulted. *See* Report & Recommendation, at 69, n.46 & at 70. The First Circuit has repeatedly held that when a default is entered, a court must consider that all of the plaintiff's allegations of fact are true and that his or her claims are established as a matter of law. *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 13 (1st Cir. 1985); *accord Ramos-Falcon v. Autoridad de Energia Electrica*, 301 F.3d 1, 2 (1st Cir. 2002) (*per curiam*) (quoting *Quirindongo Pacheco v. Rolon Morales*, 953 F.2d 15, 16 (1st Cir. 1992) and *Brockton*, 771 F.2d at 13); *In Re The Home Restaurants Inc.*, 285 F.3d 111, 114 (1st Cir. 2002) (citing *Franco v.*

(i) to intimidate or coerce a civilian population;
(ii)to influence the policy of a government by intimidation or coercion; or
(iii)to affect the conduct of a government by assassination or kidnaping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1).

Selective Ins. Co., 184 F.3d 4, 9 at n.3 (1st Cir. 1999)); *Libertad v. Sanchez*, 215 F.3d 206, 208 (1st Cir. 2000).

This Court previously concluded that Plaintiffs would be entitled to relief if the allegations in the Amended Complaint were true when it denied the Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ungar II*, 228 F. Supp. 2d at 47. Given the PA's and PLO's default and fact that the allegations in the Amended Complaint must now be deemed true, there is no merit in the second objection, which essentially challenges the ATA claims asserted in the Amended Complaint. Therefore, for these and the reasons set forth in *Ungar II*, the second objection is also overruled. *See* 228 F. Supp. 2d at 47.

The PA's and PLO's third objection is that the Report and Recommendation fails to give effect to their argument that they are entitled to a final determination of their claim to sovereign immunity before the burdens of litigation are imposed on them. Objections, at para. 3. To support this argument, the Defendants cite *In re Papandreou*, which dealt with a defendant's petition for a writ of mandamus to vacate an Order compelling discovery related to a sovereign immunity defense. 329 U.S. App. D.C. 210, 139 F.3d 247, 249-50 (D.C. Cir. 1998). The Circuit Court found that this discovery should not have been authorized without a showing of need and before the district court considered the alternate, non-merits routes to dismissal of standing, forum non conveniens, personal jurisdiction, and the act of state doctrine that were asserted by the defendants. *Id.* at 254-56. The Court noted that an assertion of immunity should not increase litigation costs at the expense and neglect of swifter routes to dismissal. *See id.* at 254.

Aside from the fact that *Papandreou* does not directly support the Defendants' argument, their continued flawed assertions of sovereign immunity, despite their own admissions that they are not a foreign State as defined by the FSIA, have increased the costs borne by Plaintiffs and prolonged this litigation unnecessarily. Unlike the situation presented in *Papandreou*, the PA and PLO refused to participate in discovery even after this Court heard and rejected the alternate, non-merits routes to dismissal of personal jurisdiction, insufficient service of process, improper venue, and forum non conveniens. *Ungar I*, 153 F. Supp. 2d at 87-100. Moreover, when Judge Martin heard, considered, and ultimately rejected the Defendants' objection during hearings in July of 2003, this writer had already determined that the PA was not a foreign State or a representative thereof as defined by the FSIA and consequently, was not immune from suit under the ATA. *See* Report & Recommendation, at 28-29; *Ungar II*, 228 F. Supp. 2d at 49. This Court has since determined that there is no basis whatsoever for the PA or PLO to claim sovereign immunity. *Ungar IV*, 315 F. Supp. 2d at 179, n.7. Therefore, for all of these reasons and those set forth in the portions of *Ungar II* and *Ungar IV* referred to above, the Defendants' third objection is also overruled.

The fourth objection asserts that the Report and Recommendation fails to recognize and give effect to the adverse conditions facing the Palestinian government and the PA and PLO, which made discovery difficult and contrary to Palestinian national interests. Objections, at para. 4. This assertion is disingenuous, especially in light of the fact that such conditions have not prevented the PA and PLO from making the extensive filings reflected throughout the procedural history of this case. *See Ungar IV*, 315 F. Supp. 2d at 169-171. As Judge Martin points out, this objection, although repeatedly raised by the PA and PLO, remains

unsupported by affidavit or other admissible evidence. *See* Report & Recommendation, at 21-22. Furthermore, this Court has granted the PA and PLO numerous indulgences in the form of extensions of time for filing papers and continuances of scheduled hearings. *See id.* at 25 & 64. Yet, these Defendants made the deliberate choice not participate in this litigation and have not answered a single interrogatory or request for admission or produced a single document sought by Plaintiffs. Therefore, the Defendants' fourth objection to the Report and Recommendation has no merit and is also overruled.

Next, the PA and PLO object to Judge Martin's conclusion that this Court has personal jurisdiction in the instant case. Objections, at para. 5. This Court dealt with the issue of personal jurisdiction at length and rejected this same argument in *Ungar I*. 153 F. Supp. 2d at 86. This writer sees no need to revisit that decision and overrules the Defendants' fifth objection based on the authorities and reasoning set forth in that opinion. *See Ungar I*, 153 F. Supp. 2d at 86-91.

The final objection raised by the PA and PLO is that the law should not require the "disproportionate compensation" recommended by the Magistrate Judge "for the death of one person in the context of an ongoing conflict in which thousands of innocent civilians on both sides have been killed without any hope of compensation." Objections, at para. 6. These Defendants argue that the ultimate burden of this compensation will be borne by an impoverished and oppressed Palestinian people who currently suffer from a continuing humanitarian crisis. *Id.* Defendants are hard pressed to succeed with this argument given the fact that they deliberately stated their intentions not to participate in and thus, waived a hearing on damages. *See* Report and Recommendation, at 72 (internal citations omitted).

Defendants' arguments are offensive at best, especially given this Court's adoption of Judge Martin's extensive recommendations relating to the damages owed by Defendant Hamas for the brutal murders that are the subject of this litigation. *See Ungar III*, 304 F. Supp. 2d at 267-277. Judge Martin applied those same findings in making his recommendations as to the damages to be assessed against the PA and PLO and this writer finds no error in those conclusions. *See* Report & Recommendation, at 72-73. The PA and PLO, and not an impoverished and oppressed Palestinian people, are responsible for and must bear the ultimate burden of providing compensation, which this Court fully acknowledges will never return to Plaintiffs the relationships and lives that existed prior to June 9, 1996. This Court hopes that in keeping with the ATA's purpose to deter acts of international terrorism, its judgment will "interrupt or at least imperil the flow of terrorism's lifeblood, money," and thus, prevent the PA and PLO from funding future terrorist acts such as the one that resulted in the Ungars' horrific deaths. *Ungar III*, 304 F. Supp. 2d at 239 (citing Antiterrorism Act of 1990: Hearing on S2465 Before the Subcomm. on Cts. and Admin. Practice of the Comm. on the Judiciary U.S. S., 101st Cong., at 85 (1990) (statement of Joseph Morris)). For all of these reasons, the Defendants' final objection to the Report and Recommendation is also hereby, overruled.

In sum, this Court overrules each of the PA's and PLO's objections for the reasons stated above. This Court adopts in toto Judge Martin's March 31, 2004 Report and Recommendation and publishes it with this Memorandum and Order. Judgment shall be entered against the PA and PLO as directed below.

The PA's Appeal of Judge Martin's Order Imposing Sanctions for their Delays and Refusal to Participate in Discovery

The PA appeals a separate Order issued by Judge Martin on March 31, 2004, which granted Plaintiffs' request for attorneys' fees pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure. Judge Martin ordered the PA to pay attorneys' fees as a sanction for its delays and ultimate refusal to comply with Plaintiffs' discovery requests and this Court's discovery orders. Report & Recommendation, at 75. Judge Martin imposed this sanction separately and independently from his recommendation that this Court award attorneys' fees pursuant to the ATA and in the event that this writer declined to enter a default judgment in this case. *Id.* The PA argues that: 1) the grant of attorneys' fees is unauthorized and excessive in amount; 2) their position with respect to discovery was taken in good faith; and 3) the discovery demanded was unreasonable for essentially the same reasons as those offered in its objections to the Report and Recommendation. Notice of Appeal, at 1-2. Once again, this Court does not find any of those arguments persuasive.

Rule 37(b) of the Federal Rules of Civil Procedure allows a court to order the payment of attorneys' fees as a sanction for failing to obey an order to provide or permit discovery. Fed. R. Civ. P. 37(b) (West 2004). A magistrate judge's determination to award attorneys' fees as a discovery sanction pursuant to this Rule is a non-dispositive matter, which the district court reviews under the clearly erroneous standard. *Thomas E. Hoar Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) (citations omitted). *See also, Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997) (noting that discovery orders are non-dispositive and magistrate judges have the authority to order discovery sanctions). A

determination is "clearly erroneous" when, although there is evidence to support it, the court, after reviewing all the evidence, is left with the definite and firm conviction that the magistrate judge made a mistake. *Harvard Pilgrim*, 2004 U.S. Dist. LEXIS 9399, 2004 WL at *4 (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948)). In conducting this review, the district court must refrain from second guessing the magistrate judge's pre-trial discovery rulings. *Id.* (citing *Mutual Fire, Marine & Inland Ins. Co. v. Jenckes Mach. Co.*, 1986 U.S. Dist. LEXIS 29193, No. 85-0586, 1986 WL 9717, at *1 (D.R.I. Feb. 19, 1986)).

As defense counsel conceded during oral arguments, this Court's adoption of Judge Martin's Report and Recommendation disposes of the present appeal. Given the PA's history of refusing to comply with this Court's orders and the rules of procedure governing depositions, interrogatories, and requests for the production of documents and for admissions, this Court finds Judge Martin's conclusion to sanction the PA for its deliberate actions to delay the completion of this litigation to be clearly correct. Therefore, for these and the reasons previously mentioned with regard to the other objections to the Report and Recommendation, the PA's appeal of Judge Martin's Order hereby, is denied.

Plaintiffs' Motion to Amend this Court's Decision and Order Regarding Sovereign Immunity

The final matter before this Court is Plaintiffs' Motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to amend this Court's Decision and Order regarding sovereign immunity. *Ungar IV*, 315 F. Supp. 2d 164. In that decision, this Court noted that the PA and PLO

had not waived sovereign immunity, even though it ultimately held that those Defendants were not entitled to such immunity. *Id.* at 173. Plaintiffs request that this Court amend its judgment to hold instead that even assuming that the defendants were "foreign States," they have waived any claims to sovereign immunity. Mem. in Supp. of Pls.' Mot. Pursuant to Fed. R. Civ. P. 59(e), at 4. Neither the PA nor the PLO have filed any objections to this motion.

Rule 59(e) allows a court to alter or amend its judgment if a motion to do so is filed no later than ten days after the original judgment is entered. *See Commercial Assoc. v. Tilcon Gammino, Inc.*, 801 F. Supp. 939, 942 (D.R.I. 1992); Fed. R. Civ. P. 59(e) (West 2004). A court has broad discretion in deciding a motion brought pursuant to this Rule. *DeSenne v. Jamestown Boat Yard Inc.*, 781 F. Supp. 866, 869 (D.R.I. 1991) (citing *United States v. Parcel of Land*, 896 F.2d 605, 611 (1st Cir. 1990)). *See also Commercial Assoc.*, 801 F. Supp. at 942 (citing *White v. N.H. Dep't. of Employment. Sec.*, 455 U.S. 445, 450-51, 71 L. Ed. 2d 325, 102 S. Ct. 1162 (1982) (quoting the Advisory Committee's notes on the 1946 Amendments to the Federal Rules)). The most common grounds for granting a Rule 59(e) motion are a manifest error of law or fact or newly discovered evidence. *DeSenne*, 781 F. Supp. at 869 (citing *Kalman v. Berlyn Corp.*, 706 F. Supp. 970, 974 (D.Mass. 1989)). In order to show a manifest error of law or fact, the moving party must present a substantial reason that the court is in error. *Id.* Since Plaintiffs have not presented any newly discovered evidence, this Court will confine its discussion to whether or not its conclusion that the PA and PLO did not waive sovereign immunity was a manifest error of law or fact.

This writer made no such error for two reasons. First, the statements of the PA and PLO cited by Plaintiffs are

admissions that they do not satisfy the criteria for statehood required by United States' and international law rather than the explicit waiver of sovereign immunity contemplated by the FSIA exception. Second, this Court's discussion in *Ungar IV* regarding the issue of waiver is dictum and ancillary to its holding that the PA and PLO were not and did not represent a foreign State that is entitled to sovereign immunity.

As this Court noted in *Ungar IV*, the FSIA provides an exception to sovereign immunity when a foreign State waives its immunity either explicitly or by implication. 315 F. Supp. 2d at 173 (citing 28 U.S.C.A. § 1605(a)(1)). The Supreme Court has directed that explicit waivers of sovereign immunity are narrowly construed in favor of the sovereign. *Library of Cong. v. Shaw*, 478 U.S. 310, 318, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). An express waiver under the FSIA must give a clear, complete, unambiguous, and unmistakable manifestation of the sovereign's intent to waive its immunity. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 353 U.S. App. D.C. 147, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (citing *Aquamar S.A. Del Monte Fresh Produce N.A. Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999)). In creating the waiver exception to sovereign immunity, Congress anticipated that at a minimum, a waiver would not be found absent a State's conscious decision to take part in the litigation and failure to raise the sovereign immunity defense despite an opportunity to do so. *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 733 (7th Cir. 2000) (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985) (*per curiam*)). A foreign State's indication that it does not intend to participate in the litigation does not constitute the conscious decision required to explicitly waive a sovereign immunity defense. *Id.* However, Federal Courts have found an explicit waiver of sovereign immunity where a foreign State is a party to an agreement whose terms include specific language that

the parties waive any right to sovereign immunity. *See World Wide Minerals*, 296 F.3d at 1163; *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47, 49 (2d Cir. 1982) (both noting the express provisions of various agreements containing explicit waivers of sovereign immunity). In contrast to an explicit waiver, an admission is an adversary's position which is contrary to and inconsistent with a contention made later in the litigation. *Cox v. Esso Shipping Co.*, 247 F.2d 629, 632 (5th Cir. 1957); *Vockie v. Gen. Motors Corp.*, 66 F.R.D. 57, 60 (E.D. Pa. 1975). *See also*, Black's Law Dictionary, 48 (7th ed. 1999) (admission is a voluntary acknowledgment of the existence of facts relevant to an adversary's case).

Plaintiffs point to the PA's and PLO's statements that their status is "unusual," "particular," and "undefined," as indicating that those Defendants have waived any defense of sovereign immunity. Mem. in Support of Pls.' Mtn. Pursuant to Fed. R. Civ. P. 59(e), at 2. These statements are contrary to and inconsistent with the PA's and PLO's position that they satisfy the criteria for statehood discussed in *Ungar IV*. *See* 315 F. Supp. 2d at 177 (noting that an entity is a State when it possesses a permanent population, defined territory, a government, and the capacity to enter into relations with other States). Therefore, the statements are, as Plaintiffs point out, express admissions that neither Defendant satisfies the criteria for statehood and thus, each Defendant is not a foreign State that is entitled to immunity under the FSIA. *See* Mem. in Support of Pls.' Mtn. Pursuant to Fed. R. Civ. P. 59(e), at 1 (emphasis added). Furthermore, the PA's and PLO's decision and instructions to counsel not to participate in the instant litigation until this Court ruled on their sovereign immunity defense did not constitute a complete, unambiguous, and unmistakable manifestation of an intent to waive any purported sovereign immunity defense. *See Haven*, 215 F.3d

at 733. Therefore, this Court sees no manifest error in its conclusion that the PA and PLO did not waive the sovereign immunity defense.

Alternatively, this Court's conclusion that neither the PA, the PLO, nor the entity called Palestine was a foreign State entitled to sovereign immunity disposed of Plaintiffs' waiver argument and rendered this Court's discussion of that issue dictum. *See McConaghy v. Sequa Corp.*, 294 F. Supp. 2d 151, 160 (D.R.I. 2003) (citing Black's Law Dictionary, 454 (6th ed. 1990)) (dicta constitutes "opinions of a judge which do not embody the resolution or determination of the specific case before the court"). As this Court noted in *Ungar IV*, the waiver issue only arises if and when a court is satisfied that the party claiming sovereign immunity is a foreign State or an agent or instrumentality of a foreign State. 315 F. Supp. 2d at 176. *See also, Sotheby's Inc. v. Garcia*, 802 F. Supp. 1058, 1062-63 (S.D.N.Y. 1992) (noting that it was undisputed that the Phillippines was a foreign State as defined in the FSIA and then proceeding to assess whether or not the waiver exception applied). The specific issue before this Court in *Ungar IV* was whether or not the PA, PLO, or the entity called Palestine were or represented a foreign State that was protected by sovereign immunity. *See* 315 F. Supp. 2d at 173, 175 & 178. This writer answered that question in the negative and any observations regarding waiver were not part of the determination of the specific issue of sovereign immunity. *See id.* at 187. Simply put, the PA and PLO never had a valid defense of sovereign immunity to waive. For all of these reasons, Plaintiffs' motion to amend this Court's decision in *Ungar IV*, hereby, is denied.

As stated above, the Defendants' objections to Judge Martin's March 31, 2004 Report and Recommendation are overruled and the PA's appeal of Judge Martin's Order with

respect to attorneys' fees is denied. Plaintiffs' motion to amend this Court's Decision and Order regarding sovereign immunity is also denied. For the aforementioned reasons, and those set forth in the Report and Recommendation attached hereto, this Court adopts said Report and Recommendation and orders the Clerk to enter final judgment for the specific Plaintiffs listed below against Defendants, the Palestinian Authority and the Palestine Liberation Organization, who are jointly and severally liable for the following amounts with respect to each Plaintiff:

The Estate of Yaron Ungar	$2,932,158.00
Dvir Ungar	$30,488,482.50
Yishai Ungar	$30,488,482.50
Judith Ungar	$15,000,000.00
Meir Ungar	$15,000,000.00
Michal Cohen	$7,500,000.00
Amichai Ungar	$7,500,000.00
Dafna Ungar	$7,500,000.00

The Clerk shall also enter judgment for Plaintiffs as a group awarding them attorneys' fees against the Palestinian Authority in the amount of $11,925.00 and against the Palestine Liberation Organization in the amount of $6,345.00. The total amount of judgment, including attorneys' fees, shall be $116,421,048.00 against the Palestinian Authority and $116,415,468.00 against the Palestine Liberation Organization.

The Clerk shall enter judgment as indicated forthwith.

It is so ordered.

Robert R. Lagueux
Senior United States District Judge
July 12, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A.No. 00-105L

[Filed January 27, 2004]

THE ESTATES OF YARON	)
UNGAR AND EFRAT UNGAR	)
BY AND THROUGH THE	)
ADMINISTRATOR OF	)
THEIR ESTATES DAVID	)
STRACHMAN; DVIR	)
UNGAR, MINOR, BY HIS	)
GUARDIANS AND NEXT	)
FRIEND, PROFESSOR	)
MEYER UNGAR; JUDITH	)
UNGAR; RABBI URI	)
DASBERG; JUDITH DASBERG	)
(INDIVIDUALLYAND IN THEIR	)
CAPACITY AS LEGAL	)
GUARDIANS OF PLAINTIFFS	)
DVIR UNGAR AND YISHAI	)
UNGAR); AMICHAI UNGAR;	)
DAFNA UNGAR; AND MICHAL	)
COHEN,	)
Plaintiffs,[1]	)

[1] On July 21, 2001, this Court dismissed all claims arising out of Efrat Ungar's death because they were brought under 18 U.S.C. § 2333, and the Complaint did not allege that Efrat Ungar was a United States national. *Estates of Ungar ex rel. Strachman v. The Palestinian Auth.*, 153 F. Supp. 2d 76, 97 (D.R.I. 2001) (hereinafter, *Ungar I*). This included the claims of Efrat Ungar's Estate, those filed by Rabbi Uri Dasberg and Judith Dasberg in

	)
v.	)
	)
THE PALESTINIAN	)
AUTHORITY (A.K.A."THE	)
PALESTINIAN INTERIM SELF-	)
GOVERNMENT	)
AUTHORITY"); THE	)
PALESTINE LIBERATION	)
ORGANIZATION; YASSER	)
ARAFAT; JIBRIL RAJOUB;	)
MUHAMMED DAHLAN;	)
AMIN AL-HINDI; TAWFIK	)
TIRAWI; RAZI JABALI;	)
HAMAS – ISLAMIC RESIST	)
ANCE MOVEMENT (A.K.A.	)
"HARAKAT AL-	)
MUQAWAMA AL-ISLAMIYYA"	)
ABDEL RAHMAN ISMAIL	)
ABDEL RAHMAN GHANIMAT;	)
JAMAL ABDEL FATAH	)
TZABICH AL HOR; RAED	)
FAKHRI ABU HAMDIYA;	)
IBRAHIM GHANIMAT; AND	)
IMAN MAHMUD HASSAN	)
FUAD KAFISHE,	)
Defendants.[2]	)

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their individual capacities, and claims on behalf of Davir and Yishai Ungar. *Id.*

[2] On July 24, 2001, this Court dismissed Defendants Yasser Arafat, Jibril Rajoub, Muhammed Dahlan, Amin Al-Hindi, Twfik Tirawi, and Razi Jabali due to a lack of personal jurisdiction. *Ungar I*, 153 F. Supp. 2d at 100.

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MEMORANDUM AND ORDER

Ronald R. Lagueux, Senior United States District Judge

This matter is before the Court on Plaintiffs' motion to enter a final judgment against the Hamas Defendants pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Hamas Defendants include Hamas--Islamic Resistance Movement (a.k.a. "Harakat Al-Muqawama Al-Islamiyya") (hereinafter, Hamas), and the following individual Hamas operatives who are responsible for the shooting attack that killed Yaron and Efrat Ungar: Abdel Rahman Ismail Abdel Rahman Ghanimat, Jamal Abdel Fatah Tzabich Al Hor, Raed Fakhri Abu Hamdiya, Ibrahim Ghanimat, and Iman Mahmud Hassan Faud Kafishe, ("the individual Hamas defendants"). Plaintiffs request that this Court: 1) adopt the Report and Recommendation issued by Magistrate Judge David L. Martin on July 3, 2003 and grant their motion to enter a default judgment against Hamas; 2) determine that there is no just reason for delaying the entry of a final judgment; and 3) direct the Clerk to enter a final judgment consistent with the Report and Recommendation, plus prejudgment interest.

The facts of this case are described at length in this writer's previous opinions. *See Ungar I*, 153 F. Supp. 2d 76, 82-85 (D.R.I. 2001); *The Estates of Ungar ex rel. Strachman v. The Palestinian Auth.*, 228 F. Supp. 2d 40, 41-43 (D.R.I. 2002) (hereinafter, *Ungar II*); and the attached Report and Recommendation. Therefore, there is no need to repeat the tragic events and extensive procedural history underlying this litigation. It suffices to say that on June 13, 2002, this writer referred Plaintiffs' Motion to Enter Default Judgment Against Hamas and the individual Hamas defendants to Magistrate

Judge David L. Martin for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b) (1) (B) and Local Rule 32(a). In July of 2002, Judge Martin held a three day hearing on Plaintiffs' motion to enter a default judgment and took the matter under advisement.

Judge Martin reviewed the submitted memoranda and exhibits, performed independent research, and then issued an extensive Report and Recommendation on July 3, 2003. He recommended that this Court grant Plaintiffs' motion to enter a default judgment against Hamas but deny the motion as to the individual Hamas defendants and dismiss the claims against those defendants for lack of personal jurisdiction. Report and Recommendation, at 63. Judge Martin also recommended that this Court award Plaintiffs a total of $116,409,123.00 in damages, plus prejudgment interest, attorneys fees of $65,621.25, and costs of $1,437.72. *Id.* at 63. However, the Report and Recommendation did not direct this Court to any legal authority supporting the prejudgment interest award and was silent on the applicable interest rate. On July 10, 2003, during a hearing on related matters, this writer suggested that Plaintiffs provide the Court with an analysis of the legal basis for awarding prejudgment interest and the appropriate interest rate.

The time period for filing objections to the Report and Recommendation set forth in Rule 72(b) of the Federal Rules of Civil Procedure and Local Rule 32 elapsed on July 22, 2003, with no objection having been filed. Plaintiffs filed the present motion on August 18, 2003, and submitted the requested analysis regarding prejudgment interest and a proposed decision and order. This Court heard oral argument on October 1, 2003, and took the matter under advisement. At this writer's request, Plaintiffs later submitted a supplemental memorandum on the issue of whether

prejudgment interest is permissible on an award of punitive or treble damages. The matter is now in order for decision.

This Court accepts and adopts Judge Martin's Report and Recommendation except as hereafter noted regarding prejudgment interest. Judge Martin recommended that this Court award Plaintiffs prejudgment interest but did not recommend a particular rate of interest to apply. Report and Recommendation, at 62. Plaintiffs urge this Court to award prejudgment interest at a rate of nine percent per annum. Mem. in Supp. of Pls.' Mot. for Entry of Final J. Against Hamas Pursuant to Fed. R. Civ. P. 54(b), at 9 (citing *Chang v. Univ. of R.I.*, 606 F. Supp. 1161, 1275 (D.R.I. 1985)). Plaintiffs cite to this Court's longstanding practice of applying a nine percent interest rate in civil rights actions and argue that there is no reason to award victims of terrorist acts any less. *Id.* They ask that interest accrue from June 9, 1996, (the date of this tragic incident) on the entire amount of the proposed judgement or, alternatively, on the original compensatory damages. Pls.' Supplemental Mem. in Supp. of their Mot. for Entry of Final J. Against Hamas Pursuant to Fed. R. Civ. P. 54(b), at 3.

Plaintiffs' Request for Prejudgment Interest

This Court need not decide the applicable prejudgment interest rate or whether such interest applies to all or part of the judgment for two reasons. First, the congressional purpose behind 18 U.S.C. § 2333 was to deter acts of international terrorism and this Court will not add prejudgment interest to the substantial penalties of treble damages, court costs, and attorney's fees already provided for by Congress. Second, this Court finds the treble damages provision of 18 U.S.C. § 2333 overwhelmingly punitive, which makes an award of prejudgment interest inappropriate.

Therefore, this Court declines to adopt Judge Martin's recommendation that Plaintiffs be awarded prejudgment interest.

When a complaint presents a federal question, the issue of whether or not the plaintiff may recover prejudgment interest is a matter of federal law. *Robinson v. Watts Detective Agency*, 685 F.2d 729, 741 (1st Cir. 1982). When there is no provision in the statute in question regarding prejudgment interest, the court looks to federal common law for guidance. *Id.* Federal case law in this area is clear. The decision of whether or not to award prejudgment interest rests within the sound discretion of the trial court. *Criado v. IBM Corp.*, 145 F.3d 437, 446 (1st Cir. 1998); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 602 (1st Cir. 1987); *United States v. California Bd. of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981); Chang, 606 F. Supp. at 1274. *See also Rao v. New York City Health and Hosps. Corp.*, 882 F. Supp. 321, 325 (S.D.N.Y. 1995) and *Bingham v. Zolt*, 810 F. Supp. 100, 101 (S.D.N.Y. 1993) (both noting that when the applicable federal statute is silent on the availability of prejudgment interest, a court may award such interest in accord with its equitable discretion). The district court has wide latitude in determining the appropriate remedy and there is no abuse of discretion when its award makes the plaintiff whole and is sufficient to deter the defendant from future wrongdoing. *Criado*, 145 F.3d at 446. Prejudgment interest is presumptively available in suits brought under federal law, unless punitive damages are also awarded. *Parington v. Broyhimm Furniture Indus. Inc.*, 999 F.2d 269, 274 (7th Cir. 1993).

The Supreme Court's decision in *Rodgers v. United States*, 332 U.S. 371, 92 L. Ed. 3, 68 S. Ct. 5 (1947), guides a court in deciding whether or not to award prejudgment interest. The Court noted that penalties imposed by an Act of

Congress bear interest only if and to the extent that interest is required by federal law. *Rodgers*, 322 U.S. at 373. Absent Congress' unequivocal prohibition of prejudgment interest, courts should grant or deny interest by looking to the congressional purpose underlying the particular statute. *Id.* at 373; *Golden State Transit Corp. v. City of Los Angeles*, 773 F. Supp. 204, 208 (C.D. Cal. 1991) (citing *Rodgers*, 322 U.S. at 373). *See also Segal v. Gilbert Color Sys. Inc.*, 746 F.2d 78, 82 (1st Cir. 1984) (when the statute is silent on the question of prejudgment interest, courts turn to legislative history). In *Rodgers*, the framework of the Agricultural Adjustment Act and the reports of the congressional committees that drafted it demonstrated a primary purpose to limit farm production and marketing to the quotas allotted by law, and an intent to deter farmers from exceeding those quotas. 332 U.S. at 374. Given this clear intent to deter, the Court concluded that Congress did not also intend for courts to add prejudgment interest to the substantial penalties already imposed on non-cooperating farmers. *Id.* at 376.

In the instant case, Plaintiffs brought their Complaint pursuant to 18 U.S.C. § 2333. Enacted as part of the Antiterrorism Act of 1991[3], Section 2333 states:

> Any national of the United States injured in his or her person, property, or business by reason of an act of

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[3] Congress originally enacted Sections 2331-2338 as part of the Antiterrorism Act of 1990. Pub.L. No. 101-519, § 132, 104 Stat. 2250-2253 (1990). However, that Public Law has no currently effective sections. Congress re-enacted these sections as part of the Federal Courts Administration Act of 1992. Pub.L. No. 102-572, Title X, § 1003(a) (1) - (5), 106 Stat. 4521-4524 (1992), which was amended on October 31, 1994 to Pub.L.No. 103-429, § 2(1), 108 Stat. 4377. Ungar II, 228 F. Supp. 2d at 41 n.1.

> international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(a)(1992). Like the Agricultural Adjustment Act in Rodgers, neither Section 2333 nor any other federal statute address the issue of prejudgment interest in this context. Therefore, this writer turns to the legislative history of Section 2333 to determine Congress' purpose for creating the treble damages on which Plaintiffs request prejudgment interest.

On April 14, 1990, Senator Charles E. Grassley (R. Iowa) introduced S.2465, (now 18 U.S.C. § 2333) a bill providing a new, federal, civil cause of action for acts of international terrorism. S. Rep. No. 102-17, at 63 (1991). The bill was intended to fill a gap in the law by establishing a civil counterpart to the existing criminal statutes. 136 Cong. Rec. S14279-01 (1990). S.2465 gave victims of terrorism the remedies of traditional American tort law, including treble damages and attorney's fees. 137 Cong. Rec. S4511-04 (1991).

The legislative history of 18 U.S.C. § 2333 evinces a clear congressional intent to deter and punish acts of international terrorism. During the floor debates, Senator Grassley spoke of holding terrorists accountable "where it hurts them most: at their lifeline, their funds." 136 Cong. Rec. S14279-01 (1990). He stated that his bill would put terrorists on notice "to keep their hands off Americans and their eyes on their assets," 136 Cong. Rec. S14279-01, and "would allow victims to pursue renegade terrorist

organizations, their leaders, and the resources that keep them in business, their money." 138 Cong. Rec. S17252 (1992).

The Subcommittee on Courts and Administrative Practice held a hearing on S.2465 where the testimony focused on the bill's deterrent effect on the commission of acts of international terrorism against Americans. Antiterrorism Act of 1990: Hearing on S2465 Before the Subcomm. on Cts. and Admin. Practice of the Comm. on the Judiciary U.S. S., 101st Cong. (1990). One witness told the committee that in order to be an effective weapon against terrorism, S2465 had to punish by "hitting terrorists where it hurts, in their pockets." *Id.* at 133 (statement of Wendy Collins Perdue, Associate Professor, Georgetown University Law Center). Joseph A. Morris, President and General Counsel for the Lincoln Legal Foundation in Chicago, testified that S.2465 would impose liability at any point along the chain of terrorism and would "interrupt, or at least imperil, the flow of terrorism's lifeblood, money." *Id.* at 85. While noting that executing civil judgments may be difficult, Morris testified that the bill would contribute to the antiterrorism struggle by deterring terrorists from choosing American targets and by "drying up terrorism's financial support in the United States." *Id.* at 85. He also noted the deterrent power of provisions allowing for treble damages, court costs, and attorney's fees. *Id.* at 89. Another witness testified that it would not be enough to simply go after the individual terrorists; the bill must "strike at the heart of the organization" and "go after the funding." *Id.* at 110 (statement of Daniel Pipes, Director of the Foreign Policy Research Institute).

Thus, the legislative history of Section 2333 shows an unequivocal congressional intent to deter acts of international terrorism and punish those who commit such acts against American citizens. A New York District Court arrived at a

similar conclusion when it denied punitive damages to two relatives of victims of the September 11, 2001 attacks on the World Trade Center. *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 240 (S.D.N.Y. 2003). That Court held that it would not award additional punitive damages because the treble damages provision of 18 U.S.C. § 2333 already provided a penalty. *Id.* at 240. Given Congress' clear intent to deter and punish terrorist acts, this Court is unable to conclude that Congress also intended to add interest to the substantial penalties of treble damages, court costs, and attorney's fees that are already imposed by the statute. Therefore, Plaintiffs' request for prejudgment interest must be denied.

Prejudgment interest is also inappropriate in this case because the treble damages provision of Section 2333 is overwhelmingly punitive, and prejudgment interest does not apply to a punitive damages award. *See* infra, at pg. 12. Prejudgment interest and treble, or multiple damages, serve different purposes. *Suiter v. Mitchell Motor Coach Sales Inc.*, 151 F.3d 1275, 1289 (10th Cir. 1998). Prejudgment interest compensates a plaintiff for being deprived of the monetary value of his or her loss from the time of the loss until the payment of judgment. *Id.* at 1288; *Faper Converting Mach. Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 23 (D.C. Cir. 1984). *See also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175, 103 L. Ed. 2d 146, 109 S. Ct. 987 (1989) (prejudgment interest has been traditionally considered part of the compensation due to the plaintiff); *Golden State Transit Corp.*, 773 F. Supp. at 208 (prejudgment interest is an element of compensation and not a penalty). In contrast, multiple or treble damages serve to punish and are thus punitive in nature. *McEvoy Travel Bureau Inc. v. Norton Co.*, 408 Mass. 704, 563 N.E. 2d 188, 196 (Mass. 1990). *See*

also, Suiter, 151 F.3d at 1289; *Paper Converting Machine Co.*, 745 F.2d at 23.

Prejudgment interest does not apply to punitive damages awards. *United States v. Reul*, 959 F.2d 1572, 1578 (D.C. Cir. 1992); *Wickham Contracting Co. v. Local Union No. 3, Int'l. Bhd. of Elec. Workers*, 955 F.2d 831, 834 (2d Cir. 1992). *See also Murphy v. United Steelworkers of America*, 507 A.2d 1342, 1346 (R.I. 1986) (holding that Rhode Island's prejudgment interest statute does not apply to punitive damages); Right to prejudgment interest on punitive or multiple damages awards, 9 A.L.R. 5th 63 (1993) (noting that attempts to collect prejudgment interest on punitive and statutory multiple damages are unsuccessful in a majority of courts). In *City Coal Co. of Springfiled, Inc. v. Noonan*, the Massachusetts Supreme Judicial Court decided not to award prejudgment interest on the treble damages awarded pursuant to a state law. 434 Mass. 709, 751 N.E.2d 894, 900 (Mass. 2001). The Court noted that no compensatory purpose would be served by imposing interest on punitive damages and saw no reason to exempt treble damages from the principle that adding interest on punitive damages has the "flavor of unseemly piling on." *Id.* In addition, a New York District Court has found that the treble damages available in actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO") adequately compensate plaintiffs and obviate the need for prejudgment interest. *Bingham*, 810 F. Supp. at 102. *See also Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971) rev'd on other grounds, 409 U.S. 363, 389, 34 L. Ed. 2d 577, 93 S. Ct. 647 (1973) (finding that the treble damages provided for under the Clayton Act sufficiently compensated the plaintiff and made an award of prejudgment interest unnecessary).

This Court recognizes that no amount of money will ever adequately compensate Plaintiffs for the devastating and incomprehensible losses that they suffered as a result of these heinous terrorist acts. However, Congress' clear intent to deter and punish those who commit acts of international terrorism makes Section 2333 overwhelmingly punitive and precludes this Court from awarding prejudgment interest on what is essentially a punitive damages award.

Plaintiffs rely on *Atena Cas. Sur. Co. v. Rodco Autobody*, 43 F.3d 1546, 1571 (1st Cir. 1994), for their argument that there is no abuse of discretion when a court applies prejudgment interest to a treble damages award under a federal statute. Pls.' Supplemental Mem. in Supp. of their Mot. for Entry of Final J. Against Hamas Pursuant to Fed. R. Civ. Pro. 54(b), at 2. However, the discussion of prejudgment interest in Atena Casualty, is dictum because the defendant failed to preserve that issue for appeal. 43 F.3d at 1571. The First Circuit recognized "some force" in the defendant's argument that prejudgment interest on treble damages was inappropriate because those damages were punitive. *Id.* However, the Court noted that it could be reasonably argued that damages in RICO actions were primarily compensatory and that an award of prejudgment interest was proper. *Id.* at 1572.

Given the legislative history discussed above, it cannot be reasonably argued that the treble damages provided for in Section 2333 are primarily compensatory. The punitive aspect and congressional intent to deter and punish those who commit terrorist acts permeate the statute and overshadow its compensatory aspects. Therefore, this Court cannot adopt Judge Martin's recommendation that prejudgment interest be awarded.

Plaintiffs' Motion to Enter Final Judgment Against Hamas

This Court now turns to Plaintiffs' motion to enter a final judgment against Hamas. Since this writer adopts Judge Martin's recommendation that the claims against the individual Hamas defendants be dismissed for lack of personal jurisdiction, it is only necessary to consider Plaintiffs' motion with regard to Defendant, Hamas.

Rule 54(b) of the Federal Rules of Civil Procedure allows a court to direct the entry of a final judgment as to one or more but not all of the claims or parties. A court granting a motion brought under Rule 54(b) must make: 1) an express determination that there is no just reason for delay; 2) an express direction that judgment be entered; and 3) a brief but particularized statement of its reasons for acting in order to demonstrate that the rule was properly invoked. Fed. R. Civ. P. 54(b). *See also Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 39 (1st Cir. 1991) (citing *Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 43, n.4 (1st Cir. 1988)); *Quinn v. City of Boston*, 325 F.3d 18, 26 (1st Cir. 2003) (noting that the trial judge must make more than a "rote r tal of Rule 54(b)'s talismanic phrase"). When a non-defaulting party continues to litigate, ensuring collection of a judgment is a proper basis under Rule 54(b) to enter a final judgment against a defaulting party. *See Storage Computer Corp. v. Worldwide Domination Corp.*, 2002 DNH 134, 208 F.R.D. 474, 476 (D.N.H. 2002). In that situation, a delay in entering a final judgment will cause an injustice to the plaintiff because the plaintiff may become unable to collect. *Id.*

This Court concludes that there is no just reason for delay and Plaintiffs' motion must be granted because the limited pool of Hamas assets against which Plaintiffs may execute this Court's judgment is steadily depleting. There is strong

evidence that the Holy Land Foundation for Relief and Development ("HLF") operates as a fund-raiser for Hamas in the United States. *Holy Land Found. for Relief and Dev. v. Ashcroft*, 357 U.S. App. D.C. 35, 333 F.3d 156, 163 (D.C. Cir. 2003). On December 4, 2001, the Office of Foreign Asset Control, a division of the Treasury Department, determined that the HLF acts "for or on behalf of" Hamas and was thus a Specially Designated Terrorist under Executive Order 12947 and a Specially Designated Global Terrorist under Executive Order 13224. *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002). These designations allowed the Treasury Department to block all of the HLF's funds, accounts, and real property. *Id.*

The Terrorism Risk Insurance Act of 2002, ("TRIA") subjects the blocked assets of a terrorist party, and any agency or instrumentality of that terrorist party, to execution or attachment in order to satisfy a judgment against them on any claim based on an act of terrorism. Pub. L. No. 107-297, 116 § 201(a), Stat. 2322 (2002). The HLF is an agency and instrumentality of Hamas because it acts "for or on behalf of" Hamas as Hamas' fund-raising agent in the United States. Therefore, the HLF's blocked assets are also subject to attachment and execution under the TRIA in order to satisfy the present judgment against Hamas.

However, these blocked assets are steadily depleting because the Treasury Department has allowed the HLF to use the assets to pay its attorneys to challenge the blocking order and defend the HLF against a civil action arising from its collection of funds for Hamas. An Asssessment of the Tools Needed to Fight the Financing of Terrorism Before the Senate Comm. on the Judiciary, 107th Cong. Nov. 20, 2002 (testimony of Nathan Lewin, Esq. of Lewin & Lewin, LLP),

available at: 2002 WL 31648382, at *37. Any delay in entering a final judgment against Hamas will allow further depletion of these assets and reduce the amount of money available to satisfy this Court's judgment. Given Presidents Clinton and Bush's designations of Hamas as a terrorist organization, it is unlikely that Hamas will bring any new assets into the United States. *See* Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995); Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). Therefore, the blocked assets of the HLF and Hamas may be Plaintiffs' sole source of money to satisfy this Court's judgment. When the HLF and/or Hamas fully deplete these assets, this Court's judgment against Hamas will likely become a dead letter. Such a result would defeat Congress' clear intent that 18 U.S.C. § 2333 deter terrorist acts through the enforcement of civil causes of action such as the one presently before the Court.

Simply put, time is of the essence. Any delay in entering a final judgment against Hamas may make Plaintiffs unable to collect the compensation due to them and cause Plaintiffs to suffer further injustices at the hands of Hamas. Therefore, it is the determination of this Court that there is no just reason for delay and that Plaintiffs' motion to enter a final judgment against Hamas should be granted.

For the afformentioned reasons, and those set forth in the Report and Recommendation attached hereto, this Court, hereby, 1) adopts Judge Martin's Report and Recommendation, except with regard to prejudgment interest; 2) finds that there is no just reason for delay; and 3) orders the Clerk to enter a final judgment against Hamas with specificity in the amounts indicated below after the trebling provided for in 18 U.S.C. § 2333:

Estate of Yaron Ungar
for lost earnings: $1,432,158.00
for pain and suffering of decedent: $1,500,000.00

Dvir Ungar (son)
for loss of companionship, society, and guidance and mental anguish: $30,000,000.00
For loss of parental services: $488,482.50[4]

Yishai Ungar (son)
for loss of companionship, society, and guidance and mental anguish: $30,000,000.00
for loss of parental services: $488,482.50[5]

Judith Ungar (mother)
for loss of society and companionship
and mental anguish: $15,000,000.00

Meir Ungar (father)
for loss of society and companionship and mental anguish: $15,000,000.00

Michal Cohen (sister)
for loss of society and companionship and mental anguish: $7,500,000.00

Amichai Ungar (brother)
for loss of society and companionship and mental anguish: $7,500,000.00

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[4] The amount designated for loss of parental services shall be paid to the legal guardians of Dvir Ungar.

[5] The amount designated for loss of parental services shall be paid to the legal guardians of Yishai Ungar.

Dafna Ungar (sister)
for loss of society and companionship and mental anguish:
$7,500,000.00

Total: $116,409,123.00

Plaintiffs, as a group, are also awarded $65,621.25 for attorney's fees and $1,437.72 in court costs.

The Clerk shall enter judgment forthwith.

It is so ordered.

Ronald R. Lagueux,
Senior United States District Judge
January 27, 2004

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-2079

[May 20, 2005]

EFRAT UNGAR ET AL.,	)
Plaintiffs, Appellees,	)
	)
v.	)
	)
THE PALESTINE LIBERATION	)
ORGANIZATION ET AL.,	)
Defendants, Appellants.	)
	)

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en ban having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered theat the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:
Richard Cushing Donovan, Clerk

By: Margaret Carter
Chief Deputy Clerk

Constitutional and Statutory Provisions

Constitution of the United States

Article. I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

***

Section 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article. II.

Section 1.

The executive Power shall be vested in a President of the United States of America....

Section 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments....

Article. III.

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make....

Article. VI.

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This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Federal Statutes

Title 18 – Crimes and Criminal Procedure–Part I

CHAPTER 113A-TERRORISM

Sec.

2331. Definitions.

2332. Criminal penalties.– omitted

2333. Civil remedies.

2334. Jurisdiction and venue.

2335. Limitation of actions.

2336. Other limitations.

2337. Suits against Government officials.

2338. Exclusive Federal jurisdiction.

2331. Definitions

As used in this chapter --

(1) the term 'international terrorism' means activities that --

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended --

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term 'national of the United States' has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;

(3) the term 'person' means any individual or entity capable of holding a legal or beneficial interest in property; and

(4) the term 'act of war' means any act occurring in the course of --

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin.

2332 Criminal Penalties –omitted

2333. Civil remedies

(a) Action and Jurisdiction. Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

(b) Estoppel Under United States Law. A final judgment or decree rendered in favor of the United States in any criminal proceeding under section 1116, 1201, 1203, or 2332 of this title or section 902(i), (k), (l), (n), or (r) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1472(i), (k), (l), (n), or (r)) shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(c) Estoppel Under Foreign Law. A final judgment or decree rendered in favor of any foreign state in any criminal proceeding shall, to the extent that such judgment or decree may be accorded full faith and credit under the law of the United States, estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

2334. Jurisdiction and venue

(a) General Venue. Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent.

Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent.

(b) Special Maritime or Territorial Jurisdiction. If the actions giving rise to the claim occurred within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of this title, then any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district in which any plaintiff resides or the defendant resides, is served, or has an agent.

(c) Service on Witnesses. A witness in a civil action brought under section 2333 of this title may be served in any other district where the defendant resides, is found, or has an agent.

(d) Convenience of the Forum. The district court shall not dismiss any action brought under section 2333 of this title on the grounds of the inconvenience or inappropriateness of the forum chosen, unless –

(1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants;

(2) that foreign court is significantly more convenient and appropriate; and

(3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States.

2335. Limitation of actions

(a) In General. Subject to subsection (b), a suit for recovery of damages under section 2333 of this title shall not be maintained unless commenced within 4 years after the date the cause of action accrued.

(b) Calculation of Period. The time of the absence of the defendant from the United States or from any jurisdiction in

which the same or a similar action arising from the same facts may be maintained by the plaintiff, or of any concealment of the defendant's whereabouts, shall not be included in the 4-year period set forth in subsection (a).

2336. Other limitations

(a) Acts of War. No action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war.

(b) Limitation on Discovery. If a party to an action under section 2333 seeks to discover the investigative files of the Department of Justice, the Assistant Attorney General, Deputy Attorney General, or Attorney General may object on the ground that compliance will interfere with a criminal investigation or prosecution of the incident, or a national security operation related to the incident, which is the subject of the civil litigation. The court shall evaluate any such objections in camera and shall stay the discovery if the court finds that granting the discovery request will substantially interfere with a criminal investigation or prosecution of the incident or a national security operation related to the incident. The court shall consider the likelihood of criminal prosecution by the Government and other factors it deems to be appropriate. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. If the court grants a stay of discovery under this subsection, it may stay the action in the interests of justice.

(c) Stay of Action for Civil Remedies. (1) The Attorney General may intervene in any civil action brought under section 2333 for the purpose of seeking a stay of the civil action. A stay shall be granted if the court finds that the continuation of the civil action will substantially interfere with

a criminal prosecution which involves the same subject matter and in which an indictment has been returned, or interfere with national security operations related to the terrorist incident that is the subject of the civil action. A stay may be granted for up to 6 months. The Attorney General may petition the court for an extension of the stay for additional 6-month periods until the criminal prosecution is completed or dismissed.

(2) In a proceeding under this subsection, the Attorney General may request that any order issued by the court for release to the parties and the public omit any reference to the basis on which the stay was sought.

2337. Suits against Government officials

No action shall be maintained under section 2333 of this title against --

(1) the United States, an agency of the United States, or an officer or employee of the United States or any agency thereof acting within his or her official capacity or under color of legal authority; or

(2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.

2338. Exclusive Federal jurisdiction

The district courts of the United States shall have exclusive jurisdiction over an action brought under this chapter.

(Added Oct. 29, 1992, P.L. 102-572, Title X, § 1003), 106 Stat. 4521).

Effective Date. This section <18 USC 2331 note> and the amendments made by this section shall apply to any pending case or any cause of action arising on or after 4 years before the date of enactment of this Act.[Oct. 29, 1992].

Title 28 – Judiciary and Judicial Procedure
Chapter 97–Jurisdictional Immunities of Foreign States

28 U.S.C. § 1604

Section 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter

(Added Pub. L. 94-583, Sec. 4(a), Oct. 21, 1976, 90 Stat. 2892.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE ESTATE OF YARON UNGAR, et al., Plaintiff,	)
v.	)
THE PALESTINIAN AUTHORITY, et al., Defendants,	)
-and-	)
M. NASSER AL-KIDWA, in his capacity as the head of the Permanent Observer Mission of Palestine to the United Nations, f/k/a the Permanent Observer Mission of the P.L.O. to the United Nations, Additional Party Receiving Notice of This Application.	)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

18 MS 0302

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TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

Background:

I. PROCEDURAL BACKGROUND 2

II. SUBSTANTIVE BACKGROUND 3

A. The Headquarters Agreement 3
B. United States Actions Toward The Observer Mission 4

Discussion:

A. FOREIGN POLICY DECISIONS GENERALLY AND DECISIONS REGARDING FOREIGN MISSIONS SPECIFICALLY ARE COMMITTED TO THE EXECUTIVE BRANCH 9

A. In General, Decisions Concerning The Disposition Of Mission Real Property Are Confined By Statute And By The Constitution To The Executive Branch - And That Authority Has Here Been Exercised 10

B. In General, Decisions Regarding The Disposition Of Foreign Missions Are Not Suited To Judicial Resolution - As Particularly Evident In This Matter 15

B. THE FOREIGN POLICY INTERESTS OF THE UNITED STATES 20

A. The Relief Requested By Plaintiffs Would Seriously Undermine The United States' Foreign Policy Goals For The Middle East 21

B. The Relief Requested By Plaintiffs Would Interfere With The United States' Relationship With The United Nations 23

Conclusica 29

TABLE OF AUTHORITIES

Federal Cases:

American Insurance Association v. Garamendi,
539 U.S. 396, 123 S. Ct. 2374 (2003) 10, 15, 16

Anti-Defamation League v. Kissinger,
No. 74 C 1545 (E.D.N.Y. 1974) 5

In re Austrian and German Holocaust Litigation,
250 F.3d 156 (2d Cir. 2001) 16

Baker v. Carr,
369 U.S. 186, 82 S. Ct. 691 (1962) 19

Can v. United States,
14 F.3d 160 (2d Cir. 1994) 19

Container Corp. of America v. Franchise Tax Board,
463 U.S. 159, 103 S. Ct. 2933 (1983) 16

Crosby v. National Foreign Trade Council,
530 U.S. 363,381,120 S. Ct. 2288, 2298 . . . . *passim*

Dames & Moore v. Regan,
453 U.S. 654, 101 S. Ct. 2972 (1981) 12

Department of the Navy v. Egan,
484 U.S. 518, 108 S. Ct. 818 (1988) 15, 19-20

Estates of Ungar and Ungar ex tel. Strachman v. Palestinian Authority,
325 F. Supp. 2d 15 (D.R.I. 2004), affd, 402 F.3d 274
(1st Cir. 2005) 2

First National City Bank v. Banco Nacional de Cuba,
406 U.S. 759, 92 S. Ct. 1808 (1972) 16

Haig v. Agee,
453 U.S. at 292, 101 S. Ct. 2766 (1981) 16

Japan Line, Ltd. v. County of Los Angeles,
441 U.S. 434, 99 S. Ct. 1813 (1979) 16-17

Palestine Information Office v. Shultz,
853 F.2d 932 (D.C. Cir. 1988) 12, 15, 17

Regan v. Wald,
468 U.S. 222, 104 S. Ct. 3026 (1984) 15, 20

Republic of Austria v. Altmanrl,
541 U.S. 677, 124 S. Ct. 2240 (2004) 28

Sale v. Haitian Centers Council, Inc.,
509 U.S. 155, 113 S. Ct. 2549(1993) 10

Schneider v. National R.R. Passenger Corp.,
72 F.3d 17 (2d Cir. 1995) 14

Sosa v. Alvarez-Maehain,
124 S. Ct. 2739 (2004) 28

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304, 57 S. Ct. 216 (1936) 15

United States v. Palestine Liberation Organization,
695 F. Supp. 1456 (S.D.N.Y. 1988) . . . . . *passim*

United States v. Pink,
315 U.S. 203, 62 S. Ct. 552 (1942) 15

Waehovia Bank, N.A.v. Burke,
414 F.3d 305 (2d Cir. 2005) 14

Federal Statutes:

18 U.S.C. §§ 2331-2338 . . . . . 2, 14
22 U.S.C. § 4301 . . . . . 6, 11
22 U.S.C. § 4302 . . . . . 12, 17
22 U.S.C. § 4304 . . . . . 7, 11
22 U.S.C. § 4305 . . . . . passim
22 U.S.C. § 4307 13
22 U.S.C. § 4308 . . . . . 11-12, 17
22 U.S.C. § 5201 . . . . . 7, 24
22 U.S.C. § 5202 . . . . . 23, 25
28 U.S.C. § 517 1

Federal Rules:

Fed. R. Civ. P. 69(a) 14

Other Federal Materials:

Determinations Under the Foreign Missions Act,
49 Fed. Reg. 48,627 (Dec. 13, 1984) 6

Determination and Designation of Benefits Concerning Palestine Information Office,
52 Fed. Reg. 37,035 (Oct. 2, 1987) 8

Designation and Determination,
59 Fed. Reg. 37,121 (July 20, 1994) 9

H.R. Rep. No. 97-102, pt. 1 (1981) 17, 18

Letter from Secretary of State George P. Schultz to Congressman Jack Kemp,
133 Cong. Rec. E1635-36 (1987) 8

Subjects of International Law: International Organizations,
1974 Digest § 4(B) 5

The Conference Report on the Foreign Missions Act, H.R. Conf. Rep. No. 693 (1982), reprinted in
1982 U.S.C.C.A.N. 691 27

United Nations Materials:
G.A. Res. 3237, U.N. GAOR,
29th Sess., A/Res/3237 (1974) 5

G.A. Res. 42/210B, U.N. GAOR,
42nd Sess., A/Res/42/210B (1987) 24

G.A. Res. 52/250, U.N. GAOR,
52nd Sess., A/Res/52/250 (1998) 5

S.C. Res. 1515, U.N. GAOR,
58th Sess., 4862nd mtg., S. Res./1515 (2003) . . . 21

Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947,
1988 I.C.J. 12 (Apr. 26) 25

Note Verbale from the United States Mission to the United Nations to thePermanent Missions and Offices of the Permanent Observers to the UnitedNations (Jan. 19, 1988) 6-7

International Agreements:

Agreement Between the United Nations and the United States of America regardingthe Headquarters of the United Nations, G.A. Res. 169 (II), 11 U.N.T.S. 11, No.147 (1947); 61 Stat. 756, T.I.A.S. No. 1676, *authorized* by S.J. Res. 144, 80thCong., 1st Sess., Pub. L. No. 80-347, *set out in* 22 U.S.C. § 287
(note) . . . . . *passim*

Preliminary Statement

The United States of America (the "United States" or the "Government") respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517.[6] The United States' interest in this matter arises from the foreign policy concerns directly implicated by Plaintiffs' effort to enforce a monetary judgment by seeking the sale and eviction of the Palestinian Permanent Observer Mission to the United Nations, located in New York City (the "Observer Mission" or the "Palestinian Observer Mission"). The United States respectfully submits this Statement (i) to articulate the clearly established federal law that commits foreign policy decisions generally, and decisions concerning the operation of foreign missions in particular, to the Executive Branch; (ii) to note that decisions concerning the disposition of foreign missions are not well-suited to judicial resolution; and (iii) to communicate the strongly-held position of the Executive Branch that it is in the United States' foreign policy interests to allow the Observer Mission to continue to operate without interference from Plaintiffs or, respectfully, from judicial process. Indeed, because of these foreign policy interests, the Executive has exercised its constitutional and legislatively delegated authority to allow the Observer Mission to operate from the property that it owns.

It is the express judgment of the United States that the relief requested by Plaintiffs would effectively prevent the Observer Mission from operating at a particularly sensitive

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[6] That statute provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States " 28 U.S.C. § 517.

moment, a result that would impair the ability of the Executive Branch to effectuate its foreign policy goals with respect to the Middle East Peace Process and at the United Nations. The granting of this relief would therefore have grave implications for United States foreign policy. Nor are these foreign policy concerns allayed by Plaintiffs' suggestion that the Observer Mission may continue to function by renting space at another location or remaining at its current location in a lease-back arrangement. Recognizing precisely the foreign policy concerns triggered by the sale or acquisition of foreign mission property, Congress has specifically conferred authority over such transactions to the Secretary of State, pursuant to the Foreign Missions Act.

Accordingly, the United States respectfully requests that the Court examine this lawsuit not merely in the isolated light of Plaintiffs' attempt to enforce a judgment, but rather against the backdrop of American foreign policy. In consideration of the strong foreign policy interests at stake here, the United States asks that the Court dismiss this matter on any available legal ground.

Background

I. PROCEDURAL BACKGROUND

Plaintiffs Estate of Yaron Ungar et al. ("Plaintiffs") seek to enforce $116 million judgments (the "Judgments") obtained in the United States District Court for the District of Rhode Island against the Palestinian Authority ("PA"), the Palestine Liberation Organization ("PLO"), and Hamas.[7] *See Estates of*

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[7] This Statement does not address the merits of the underlying litigation but rather only the particular remedies being sought here.

Ungar and Ungar ex tel. Strachman v. Palestinian Authority, 325 F. Supp. 2d 15 (D.R.I. 2004), affd, .402 F.3d 274 (1st Cir. 2005). The Judgments result from a lawsuit brought by Plaintiffs pursuant to the Anti-Terrorism Act of 1991, 18 U.S.C. §§ 2331-2338, following the 1996 Hamas terrorist murder ofYaron Ungar, an American citizen, while living in Israel)[8] *See id.* The Judgments were affirmed on appeal, see 402 F.3d 274 (P' Cir. 2005), and the PLO and PA have until October 17, 2005, to file a petition for certiorari with the United States Supreme Court.

On July 20, 2005, Plaintiffs sought by Order to Show Cause in Part I of this Court an order appointing a receiver, pursuant to N.Y.C.P.L.R. § 5228(a), to sell the real property located at 115 East 65th Street in New York City - the site of the Observer Mission - and to "eject" any individuals from its premises, with the proceeds of the sale paid to Plaintiffs and applied to the Judgments. Following several procedural adjournments memorialized in an order issued by Judge Laura Taylor Swain sitting in Part I on August 5, 2005 (the "August 5 Order"), Defendants submitted their opposition papers on August 4, 2005. In response to notification by the United States that it was considering submission of a Statement of Interest in this matter, the August 5 Order also set September 2, 2005 as the date for any such submission, with a hearing to be held on September 13, 2005 before Judge Colleen McMahon, who would then be sitting in Part I. Following a request by the United Nations for an adjournment of the hearing and an opportunity to be beard, Judge McMahon declined to adjourn the hearing date but allowed the United

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[8] The District Court dismissed claims arising from the death of Yaron Ungar's wife since she was not alleged to be an American national. *See id.*, at 15 n. 1.

Nations to submit papers on or before noon on September 12, 2005. Judge McMahon also extended the time for the United States to submit this Statement of Interest until September 12, 2005.

II. SUBSTANTIVE BACKGROUND

A. The Headquarters Agreement

Underlying several of the issues raised by this lawsuit is an international agreement entered into by the United States and the United Nations on June 22, 1947, for the purpose of establishing the permanent headquarters of the United Nations in the United States. The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations (known as the "Headquarters Agreement") establishes the conditions necessary for the operation of the United Nations in the United States and otherwise regulates the relationship between the United States and the United Nations in connection with the operations of the United Nations within the United States. *See* Declaration of Darma Drori, dated September 12, 2005 ("Drori Dec."), Exh. A (G.A. Res. 169 (II), 11 U.N.T.S. I 1, No. 147 (1947); 61 Stat. 756, T.I.A.S. No. 1676, *authorized by* S.J. Res. 144, 80th Cong., 1st Sess., Pub. L. No. 80-347, *set out in* 22 U.S.C. § 287 (note)). As host country to the United Nations, the United States assumes specific obligations to ensure that the important business of the United Nations and the missions officially associated with it can be conducted and executed without interruption.[9] *Id.*

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[9] Section I 1 of the Headquarters Agreement provides that United States federal, state and local authorities "shall not impose any impediments to transit to or from the headquarters district" by designated persons affiliated with the United Nations, including

B. United States Actions Toward The Observer Mission

The PLO established its Observer Mission in New York in 1974 shortly after the United Nations extended to it an invitation to "participate in the sessions and the work of the General Assembly in the capacity of observer [to the United Nations]." *See* Drori Dec., Exh. B (G.A. Res. 3237, U.N. GAOR, 29th Sess., A/Res/3237 (1974)).[10] Although the United States opposed the United Nations' invitation at the time, it nevertheless honored it and allowed the PLO to establish an observer mission operating out of the premises at issue. Reflecting this policy, the United States in 1974 defended in court its authority to issue visas to PLO representatives, taking the position in an action for injunctive relief brought by the Anti-Defamation League that it was required to issue the visas under the Headquarters Agreement. *See Anti-Defamation League v. Kissinger*, No. 74 C 1545

"persons invited to the headquarters district by the United Nations... on official business." *Id.* (Headquarters Agreement, § 11). The United States is obligated to carry out Section 11 "irrespective of the relations existing between" the United States and the Section 11 beneficiaries. *Id.* (Headquarters Agreement, § 12). In addition, Section 13 of the Headquarters Agreement prohibits the United States from applying its laws and regulations concerning the entry and residence of aliens "in such manner as to interfere with the privileges referred to in Section 11 ." *Id.* (Headquarters Agreement, §§ 13(a),(b)).

[10] In 1998, the United Nations conferred upon the PLO "additional rights and privileges of participation in the sessions and work of the General Assembly," including the right to participate in general debate of the General Assembly. *See* Drori Dec., Exh. C (G.A. Res. 52/250, U.N. GAOR, 52nd Sess., A/Res/52/250 (1998)).

(E.D.N.Y. 1974). In refusing Plaintiffs' request that PLO representatives be denied visas, Judge Costantino took note from the bench of the United States' "special responsibility" for providing access to the forum of the United Nations:

> This problem must be viewed in the context of the special responsibility which the United States has to provide access to the U.N. under the Headquarters Agreement. It is important to note.., that a primary goal of the U.N. is to provide a forum where peaceful discussion may displace violence as a means of resolving disputed issues. At times our responsibility to the U.N. may require us to issue visas to persons who are objectionable to certain segments of our society.

See Drori Dec., Exh. D (Subjects of International Law: International Organizations, 1974 Digest § 4(B), at 28).

Along with the execution of responsibilities owed to the United Nations, the United States has increasingly asserted administrative control over foreign missions to the United Nations, including the Palestinian Observer Mission. As discussed further below, see infra at 11-14 & 17-18, Congress passed the Foreign Missions Act, 22 U.S.C. § 4301 et seq:. ("FMA"), in 1982, which authorized the Secretary of State to regulate such missions. The Secretary subsequently determined that various provisions of the FMA were specifically applicable to the permanent observer missions to the United Nations. *See* Drori Dec., Exh. E (Determinations Under the Foreign Missions Act, 49 Fed. Reg. 48,627 (Dec. 13, 1984)). Among those provisions was Section 205, 22 U.S.C. § 4305(a), which gave the Secretary various controls over the acquisition, disposition, or use of mission property, including a 60-day period to permit the Secretary to review

proposals for all such property transactions.[11] *See id.* at ¶ 1. By a note verbale dated January 19, 1983, the United States Mission to the United Nations informed permanent observer missions, including the Palestinian Observer Mission, of the Secretary's determination, warning that "[n]on-compliance [with Section 205] could result in the Mission being required to divest itself, or forego the use of the property in question." *See* Drori Dec., Exh. F (Note Verbale from the United States

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[11] Section 205, 22 U.S.C. § 4305, provides in relevant part:

(a) Proposed acquisition, sale, or other disposition

(1) The Secretary shall require any foreign mission.., to notify the Secretary prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. The foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action --

(A) only after the expiration of the 60-day period beginning on the date of such notification...; and

(B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such notification such terms and condition as the Secretary may determine appropriate in order to remove the disapproval.

(2) For purposes of this section, "acquisition" includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.

22 U.S.C. § 4305(a).

Mission to the United Nations to the Permanent Missions and Offices of the Permanent Observers to the United Nations (Jan. 19, 1983)). Section 205 also gave the Secretary the power to "require any foreign mission to divest itself of, or forego the use of, any real property." 22 U.S.C. § 4305(b).

In 1983, the Secretary further extended to all United Nation missions, including the Palestinian Observer Mission, application of Section 204 of the FMA, 22 U.S.C. § 4304. *See* Drori Dec., Exh. E, at ¶ 2. Among other things, Section 204 enabled the Secretary to "require a foreign mission (A) to obtain benefits from or through the Secretary on such terms and conditions as the Secretary may approve, or (B) to forego the acceptance, use, or relation of any benefit " 22 U.S.C. § 4304(b). The Secretary subsequently issued a determination directing the Palestinian Observer Mission to "comply with certain conditions respecting travel and related services." *See* Drori Dec., Exh. E, at ¶ 5.

Despite its assertion of control over property disposition, benefit provision, and travel conditions concerning the Palestinian Observer Mission, the Department of State has never exercised its discretion under the FMA to close the Observer Mission or to move it from its location at East 65th Street in New York City.[12] To the contrary, the Secretary of

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[12] Although, as discussed further below, see infra at 25-27, the Executive Branch commenced a federal action in 1988 seeking injunctive relief to close the Palestinian Observer Mission, it did so based upon its belief that Congress had directed such an action under the Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 *et seq* ("ATA"). *See United States v. Palestine Liberation Org.* ("*United States v. PLO*"), 695 F.Supp. 1456 (S.D.N.Y. 1988); *see also id.* at 1470 n.35 & n.36 (noting the Department of State's expressed position that closure of the Observer Mission would constitute a

State specifically declined to close down the Observer Mission in 1986 when Congressman Jack Kemp requested such action following a terrorist attack in Jerusalem. Although Secretary of State George P. Schultz expressed his shared concern about the "claims of responsibility by elements of the PLO" for the Jerusalem attack and asserted that the Observer Mission is "in no sense accredited to the U.S.," he explained that because the Observer Mission "represents the PLO in the U.N.," the United States is "therefore... under an obligation [pursuant to the Headquarters Agreement] to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN headquarters." *See* Drori Dec., Exh. G (133 Cong. Rec. E1635-36 (1987)).

Notably, the decision to refrain from closing the Observer Mission in late 1986 stands in contrast to the Secretary's decision in October 1987 to close down the Palestine Information Office, a foreign mission in Washington, D.C. not affiliated with the United Nations. Pursuant to both the Executive Branch's Article 11 powers as well the authority delegated to him by the FMA, the Secretary ordered the Palestine Information Office to "divest itself of all real property" and to "cease operation as a mission representing the PLO because of U.S. concern over terrorism committed and supported by individuals and organizations affiliated with the PLO, and as an expression of our overall policy condemning terrorism." *See* Drori Dec., Exh. H

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violation of the Headquarters Agreement). In any event, the Court rejected injunctive relief, holding that neither the text of the ATA nor its legislative history manifested Congress' intent to "abrogate" the United States' obligations under the Headquarters Agreement and require closure of the Observer Mission. *Id.* at 1471, *see also infra* at 25-27. The United States took no further action against the Observer Mission.

(Determination and Designation of Benefits Concerning Palestine Information Office, 52 Fed. Reg. 37,035 (Oct. 2, 1987)).

More recently, and in order to facilitate the Middle East Peace Process, the United States allowed the PLO in 1994 to open an office in Washington, D.C., designating it a "foreign mission" within the terms of the FMA. *See* Drori Dec., Exh. I (Designation and Determination, 59 Fed. Reg. 37,121 (July 20, 1994))[13] Moreover, since 1994, and as discussed further below, the President has chosen to waive application to the Washington-based PLO mission of those ATA provisions that bar the establishment of a PLO office, both in order to advance the national security interests of the United States and to advance the peace process? *See infra*[14] at 23 n.17.

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[13] The designation was based in part upon the status of the PLO as "an organization representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States [by virtue of its status as an observer to the United Nations] .... " *Id.* (brackets in original).

[14] No similar waiver has been issued for the Palestinian Observer Mission because another Judge of this Court has held that the ATA does not require closure of the Mission. *See United States v. PLO*, 695 F.Supp. at 1471.

Discussion

I. FOREIGN POLICY DECISIONS GENERALLY AND DECISIONS REGARDING FOREIGN MISSIONS SPECIFICALLY ARE COMMITTED TO THE EXECUTIVE BRANCH

As discussed below, the Secretary of State has decided to allow the Palestinian Observer Mission to operate at its present location, and in so doing has exercised constitutional and statutory authorities that have vested that decision exclusively in the Executive Branch. The relief requested by the Plaintiffs would invariably upset that particular decision, and is impossible to reconcile with the constitutional and statutory scheme.

A. In General, Decisions Concerning The Disposition Of Mission Real Property Are Confined By Statute And By The Constitution To The Executive Branch - And That Authority Has Here Been Exercised

The United States Constitution vests exclusive authority in the Federal Government, and substantial authority in the Executive Branch, regarding the conduct of foreign affairs. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14, 123 S. Ct. 2374, 2386 (2003) (citations omitted). In particular, the President's power under the Constitution to "make Treaties" and "appoint Ambassadors [and] other public Ministers" with the advice and consent of the Senate, art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," *id.*, at § 3, together with the vesting of the "Executive Power" in the President, *id.*, at § 1, el. 1, confer upon the President his authority over foreign affairs. As the Supreme Court has recently reiterated, "the historical gloss on the 'executive Power' vested in Article II of the Constitution

has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414, 123 S. Ct. at 2386 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11, 72 S. Ct. 863, 897 (1952) (Frankfurter, J., concurring)). Indeed, "[w]hile Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act." *Id.* (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103,109, 68 S. Ct. 431,435 (1948) ("The President... possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ inforeign" affairs." ")); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188, 113 S. Ct. 2549, 2567 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs").

The general commitment of foreign relations to the Executive Branch is reinforced in the particular area of foreign missions, where the Executive Branch acts not only pursuant to broad constitutional authority but also pursuant to express statutory authority. Specifically, Congress has conferred authority over the sale or acquisition of foreign mission property to the Executive; it did so precisely because such transactions necessarily implicate foreign policy concerns. Pursuant to the FMA, the Secretary of State is charged with determining the "treatment to be accorded to a foreign mission in the United States." 22 U.S.C. § 4301(c). In acting pursuant to the FMA, the Secretary of State is directed to give due consideration not only to the treatment accorded to United States missions abroad but also to matters of foreign policy and national security, i.e., "matters relating to the protection of the interests of the United States." *Id.*; *see* also 22 U.S.C. § 4301(b). The FMA bestows upon the Secretary broad and

substantial authority to, for example, regulate the provision of benefits to missions, *see* 22 U.S.C. § 4304, and to require a mission to divest itself of real property where "necessary to protect the interests of the United States," 22 U.S.C. § 4305(b).

As noted above, *see supra* at 6-7 & n.6, and of particular relevance here, the FMA also authorizes the Secretary to approve or disapprove any acquisition or disposition of property of foreign missions. See 22 U.S.C. § 4305(a)(1) (requiring foreign missions to notify the Secretary of "any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission" and bestowing upon the Secretary the power to determine whether or not to allow such actions). Decisions made pursuant to the FMA, including Section 4305(a), are expressly committed to the Secretary's discretion, which is deliberately very broad under this statute. See 22 U.S.C. § 4308(g) ("Except as otherwise provided, any determination required under this chapter shall be committed to the discretion of the Secretary."); *see also* 22 U.S.C. § 4302(b) (determinations of the "meaning and applicability" of terms used in the FMA "shall be committed to the discretion of the Secretary").

In enacting the FMA, Congress was acutely aware that it was legislating in the field of foreign affairs, where the Executive Branch is preeminent and where expertise and political judgment are essential. Because the Secretary of State makes decisions about foreign missions with express congressional authorization pursuant to the FMA, she "exercises not only [the executive] powers but also those delegated by Congress." *Dames & Moore v. Reagan*, 453 U.S. 654, 668, 101 S. Ct. 2972, 2981 (1981). Her actions are therefore "supported by the strongest of presumptions and the

widest latitude of judicial interpretation," with the "burden of persuasion.., rest[ing] heavily upon any who might attack [them]." *Id.* (quoting *Youngstown*, 343 U.S. at 637, 72 S. Ct. at 871) (Jackson, J., concurring)); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381,120 S. Ct. 2288, 2298 (2000) ("Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government[.]") (citation omitted); *Palestine Information Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) ("If the authority accorded the executive branch when acting pursuant to a congressional grant of power is great, it is greater still in the case at bar because the Secretary was acting in the field of foreign affairs.").

Clearly, the FMA does not automatically preclude the routine application of state and local laws that might place incidental burdens on foreign missions; at the same time, the Secretary's discretion to exercise statutory authority, together with independent constitutional authority exercisable by the Executive Branch, was expressly preserved. Cf. 22 U.S.C. § 4307 (providing that certain statutory provisions do not, of their own accord, preempt zoning, land use, health, safety, or welfare laws and authority, but that "a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling"). Whatever the difficulty of reconciling state and local regulatory authority with the Secretary's authority in the abstract, the conflict posed by the Plaintiffs' desired remedy is patent. Since the enactment of the FMA, the Secretary of State, exercising constitutional and statutory authority vested in the Executive Branch and in her office, has permitted the Palestinian Observer Mission to operate in New York City in property which it owns. *See* Drori Dec., Exh. J, at 2 (Letter from Department of State Legal Advisor to Assistant Attorney

General, Civil Division, Department of Justice, dated September 7, 2005). Were the Observer Mission to seek to dispose of that property itself- even to satisfy a monetary judgment obtained against it, in preference to employing other assets - the Secretary's permission would have to be obtained before any transaction could be completed. See 22 U.S.C. § 4305(a)(1). The fact that Plaintiffs seek to make that decision on the Observer Mission's behalf does not minimize the inconsistency with the Secretary's authority, and indeed accentuates it. On their theory, a subsequent decision by the Secretary to permit the Observer Mission to acquire new property- which would be realized by a decision not to disapprove such acquisition within the 60-day statutory period provided for by 22 U.S.C. § 4305(a)(1)(A)[15] - would equally be subject to attack, until such point as Plaintiffs' judgments (and any others) were fully satisfied. Appointing a receiver risks setting in motion a process by which the Secretary of State's delicate judgments are repeatedly overridden.

The significant injury this relief poses to the United States' foreign policy interests is described in Part II, infra. It is evident, in any event, that it is impossible simultaneously to maintain the Secretary's decision to permit the Observer Mission to own and operate at the specified location that Plaintiffs seek to attach, and at the same time afford Plaintiffs the relief they seek. Under such circumstances, when a state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" it may not be applied. Crosb2/, 530 U.S. at 373, 120 S. Ct. at 2294 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)); *see, e.g., Wachovia Bank, N.A.v. Burke*, 414 F.3d 305 (2d Cir. 2005) (National Bank Act and

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[15] *See supra* at 6 n.6 (text of 22 U.S.C. § 4305).

regulations issued by the Office of the Comptroller of the Currency preempt state banking laws concerning operating subsidiaries of nationally chartered banks).[16] The evidence is "more than sufficient to demonstrate" that the requested relief "stands in the way of [the Federal Government's] diplomatic objectives." *Crosby*, 530 U.S. at 386, 120 S. Ct. at 2301 (citing conflicts with Congressionally-specified objectives); accord *Garamendi*, 539 U.S. at 427, 123 S. Ct. 2393 (citing conflicts with Presidential diplomatic objectives).

B. In General, Decisions Regarding The Disposition Of Foreign Missions Are Not Suited To Judicial Resolution - As Particularly Evident In This Matter

Recognizing the constitutional commitment of foreign affairs to the Executive Branch, courts have long accorded the Executive Branch the "utmost deference" in matters involving

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[16] Although the Anti-Terrorism Act of 1991, 18 U.S.C. §§ 2331-2338, the statute under which Plaintiffs brought their underlying lawsuit against Defendants in the District of Rhode Island, authorizes damage awards for certain acts of international terrorism, *see id.*, at § 2333(a), it does not mandate a mechanism by which every such award shall be enforceable. Nor does any other provision of federal law authorize in these circumstances the relief requested. Federal Rule of Civil Procedure 69(a) directs federal courts to apply state process to the execution of monetary judgments only to the extent that state process does not conflict with a federal statute. *See* Fed. R. Civ. P. 69(a) ("Process to enforce a judgment for the payment of money... shall be in accordance with the practice and procedure of the state in which the district court is held... except that any statute of the United States governs to the extent that it is applicable."); *see also Schneider v. National R.R. Passenger Corp.*, 72 F.3d 17, 19 (2d Cir. 1995) ("if there is an applicable federal statute, it is controlling") (citations omitted).

the conduct of foreign affairs. *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30, 108 S. Ct. 818, 825 (1988) ("The Court... has recognized the generally accepted view that foreign policy was the province and responsibility of the Executive. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.") (citations and quotation marks omitted). Indeed, the Supreme Court has held that "[m]atters relating to the conduct of foreign relations.., are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242, 104 S. Ct. 3026, 3038 (1984) (referring also to the "classical deference to the political branches in matters of foreign policy") (citation and quotation marks omitted); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S. Ct. 216, 221 (1936) (recognizing "'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").[17] As noted by another Judge of this Court, the "conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative - the 'political' - departments of the government." *United States v. Palestine Liberation Org.* ("*United States v. PLO*"), 695 F. Supp. 1456, 1463 (S.D.N.Y. 1988). "It is thus beyond the authority of the courts to interfere with the Executive Branch's foreign policy

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[17] *See also United States v. Pink*, 315 U.S. 203,222-23, 62 S. Ct. 552, 562 (1942) (The "conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] ... the propriety of the exercise of that power is not open to judicial inquiry .... ") (citation omitted); *Palestine Information Office*, 853 F.2d at 942 ("[O]ur deference to the State Department on questions of foreign policy is great.") (citing *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 2774 (1981)).

judgments." *In re Austrian and German Holocaust Litig.*, 250 F.3d 156, 164 (2d Cir. 2001).

This deference is due, in no small part, to the understanding that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig*, 453 U.S. at 292, 101 S. Ct. at 2774. The Supreme Court has acknowledged that courts are not capable of "determining precisely when foreign nations will be offended by particular acts," and that the "nuances" of United States foreign policy "are much more the province of the Executive Branch and Congress" than that of the courts. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196, 103 S. Ct. 2933, 2955, 2956 (1983); see also Crosb2 ~ , 530 U.S. at 386, 120 S. Ct. 2301 (same). Judicial pronouncements in areas touching on foreign policy may also disrupt the "concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Garamendi*, 539 U.S. at 413, 123 S. Ct. at 2386 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n.25, 84 S. Ct. 923, 940 n.25 (1964), and citing *Crosby*, 530 U.S. at 381-82 n.16, 120 S. Ct. at 2299 n.16); *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769, 92 S. Ct. 1808, 1814 (1972) (plurality opinion) (explaining that act of state doctrine was "fashioned because of fear that adjudication would interfere with the conduct of foreign relations"); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 99 S. Ct. 1813, 1822 (1979) (noting that dormant Foreign Commerce Clause doctrine protects the National Government's ability to "speak with one voice" in regulating commerce with foreign nations) (citation omitted).

Mindful of these concerns, courts construing the FMA have regarded the types of decisions at issue here as confined to the Executive Branch. As the District of Columbia Circuit noted, "[w]hen exercising its supervisory function over foreign missions [as it does pursuant to the FMA], the State Department acts at the apex of its power." *Palestine. Information Office*, 853 F.2d at 937; see also *id.* at 934 (holding that the "wisdom of the government's decision" to close the Palestine Information Office under the FMA is "not at issue" because "[s]uch policy questions are firmly lodged in the political branches of government").[18] In enacting the FMA, Congress explicitly committed "discretionary authorities" to the Secretary in order "to provide the flexibility, which the Department of State has not heretofore possessed, to enable the Secretary to decide which sanction or other response is most appropriate to solve a specific problem." *See* Drori Dec., Exh. K (H.R. Rep. No. 97-102, pt. 1 ("H.R. Rep. No. 97-102"), at 28 (1981)). Congress' determination to commit these matters to the Secretary's discretion is not only clear from the plain language of the FMA, *see, e.g.*, 22 U.S.C. §§ 4308(g), 4302(b), but also reflects a legislative understanding of the international impact that the Secretary's determinations may have on the United

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[18] The *Palestine* Court clearly held that it could not question the Secretary's policy decision made pursuant to the FMA, but it did undertake to review the impact of that decision on appellants' constitutional rights. *See* 853 F.2d at 934, 939-43. Such review, however, is not warranted here, where Plaintiffs have alleged no constitutional harms. In any event, the *Palestine* court determined that the foreign policy interests at stake in the Secretary's decision to close down the Palestine Information Office outweighed any "incidental impact" on appellants' constitutional rights. *Id.* at 934; *see also id.* at 942-43 (applying lower threshold to due process considerations where foreign policy interests at stake).

States' relations abroad and of the paramount need for the United States to speak with "one voice" in this area. *Crosby*, 530 U.S. at 380-82 & n.16, 120 S. Ct. at 2298-99 & n.16. In noting that Section 4302(b) commits the "interpretation and application" of the terms in Section 4302(a) to the Secretary's discretion, the House Report observed: "The provision is intended to avoid conflicting interpretations by different *government agencies and courts* and potential litigation that might detract from the efficient implementation of this title or might adversely affect the management of foreign affairs." *See* Drori Dec., Exh. K (H.R. Rep. No. 97-102, at 30) (emphasis supplied); *see also id.* at 40 ("Section 208(g) [22 U.S.C. § 4308(g)] parallels the provisions of section 202(b) [22 U.S.C. § 4302(b)] with respect to the authority of the Secretary to make determinations. This is necessary to avoid inconsistent interpretations or policies.").

The unsuitability of judicial pronouncements on matters of delicate foreign relations is, if anything, magnified by the nature of the inquiry at issue in this matter. Plaintiffs seek a determination from the Court as to the disposition of a foreign mission - a determination that is not only confined in the Secretary of State by Congress pursuant to the *FMA*, but which, when made by the Secretary, involves the weighing of a wide range of policy factors, including foreign policy factors, that are the province of the Executive Branch. Those factors include, as a general matter, whether a mission should be permitted to open or made to close; how best to implement United States obligations under international agreements; the requirements of diplomatic and foreign relations, in light of current events, with all affected nations and international organizations; the benefits of making comparable and consistent decisions with regard to foreign missions; the domestic security interests of the United States; and the practical feasibility or infeasibility of alternative options. *See*

Drori Dec., Exh. J, at 3. Nor is the unsuitability of judicial pronouncements in this area alleviated by Plaintiffs' suggestion that the Court determine instead whether the Observer Mission could, assertedly, "make a simple and easy move" to rented space at another location in the headquarters district or retain its current location with a permanent lease-back provision. *See* Plaintiffs' Reply Memorandum of Law ("Plaintiffs' Reply") at 12-14. To the contrary, the very determination of whether the Observer Mission might conceivably operate under different conditions - even ignoring the pregnant possibility that the Plaintiffs, and the receiver, might pursue and foreclose those opportunities seriatim until the prior judgments were fully satisfied necessarily implicates both the wide range of policy factors which are uniquely in the province of the Executive Branch[19] as well as the serious United States foreign policy and national security concerns discussed in the next section, *see infra* at Part II.[20]

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[19] Courts have invoked some of these same types of factors and considerations in declining to act in a variety of other contexts. Cf. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962) (citing, as relevant elements, when there is a "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"); *Can v. United States*, 14 F.3d 160, 162 (2d Cir. 1994).

[20] Plaintiffs also argue that the Observer Mission could operate from the home of the Observer. *See* Plaintiffs' Moving Memorandum of

Under analogous circumstances implicating the separation of powers, courts have been careful to avoid intruding upon the prerogatives of the Executive Branch. *See, e.g., Dep't of the Navy*, 484 U.S. at 529-30, 108 S. Ct. at 825; Re,an, 468 U.S. at 242-43, 104 S. Ct. at 3038. Under the facts at issue here, given the Secretary of State's decisions in furtherance of constitutional and statutory authority plainly implicating political and foreign policy expertise of the greatest delicacy, the discretionary remedy sought by the Plaintiffs should not be granted, and the matter dismissed on any available legal ground.

II. THE FOREIGN POLICY INTERESTS OF THE UNITED STATES

In the exercise of its constitutional and legislatively delegated authority, the United States considers and has considered it to be in the foreign policy interests of the United States to allow the PLO to continue to own and operate its observer mission at the current location in New York City. *See* Drori Dec., Exh. J; *see also supra* at 4-9 (background section). It is the express judgment of the United States that the relief sought by Plaintiffs in this matter would effectively prevent the Mission from operating by interfering with its ability to conduct its business with the United Nations at a crucial moment in the Middle East Peace Process. *See* Drori Dec., Exh. J, at 2-4. This result would significantly and negatively affect the United States' foreign policy objectives and would seriously disrupt and contravene the well-recognized authority of the Executive to determine and guide

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Law at 6. However, the Mission already functions as both the Observer Mission and the residence of its Observer, the head of Mission. *See* Drori Dec., Exh. J, at 2.

American foreign policy. *Id.* Moreover, these same concerns attach to Plaintiffs' proposal that the Observer Mission can make a "simple and easy move" to another location or lease from an as-yet unidentified landlord. *See* Plaintiffs' Reply at 12-14. Indeed, as discussed above, *see* at Part I, the FMA bestowed upon the Secretary the authority to review any sale, purchase, or lease of property by missions precisely because of both the inextricable connection of such issues to matters of foreign policy and the unsuitably of those issues to judicial management.

A. The Relief Requested By Plaintiffs Would Seriously Undermine The United States' Foreign Policy Goals For The Middle East

As a preliminary matter, it is the judgment of the United States that the relief requested by Plaintiffs "would have a negative impact at an extraordinarily sensitive moment in the negotiations to resolve the Middle East conflict." Drori Dec., Exh. J, at 3. The United States is deeply involved at the highest levels in promoting a "Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict," which articulates a vision of the development of "an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors." *See* Drori Dec., Exh. L (Press Release, United States Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003)).[21] The United States has a national security interest in

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[21] The Roadmap was endorsed by resolution of the Security Council of the United Nations in 2003. *See* Drori Dec., Exh. M (S.C. Res. 1515, U.N. GAOR, 58th Sess., 4862nd mtg., S/Res/l 515 (2003)). It is sponsored by a "Quartet" of international actors - the United

helping Israel and the Palestinians end the ongoing violence and move forward with negotiations. *See* Drori Dec., Exh. J, at 3-4. Encouraging both the new Palestinian leadership and ongoing reform of Palestinian institutions is a key component of the United States' strategy for peace in that region. *Id.* at 3. A just, lasting, and comprehensive peace between Israel and its neighbors has been a long-standing foreign policy goal of the United States in the Middle East, and the United States must maintain its ties and contacts with all sides in order to advance that goal. *Id.* After four years of violence, recent actions taken by Israel to disengage its forces and withdraw its civilians from the Gaza Strip and parts of the West Bank have created a promising opportunity for renewed efforts to implement the Roadmap and achieve its central goals. *Id.* at 3-4.

In promoting implementation of the Roadmap, it is crucial for the United States to have clear channels of communication with both parties and to retain their confidence. *Id.* at 4. It is the judgment of the United States that the proposed dispossession of the Palestinian Observer Mission of the premises in which it has been operating for more than 30 years, at a time when both the PLO and the Palestinian Authority have new, moderate leadership in the person of Mahmoud Abbas, would disrupt an important line of communication and would likely be perceived as signaling a lack of United States support for the new leadership. *Id.* As a result, it could undermine Palestinian confidence in the United States at an especially delicate time in the peace process. *Id.*

States, the European Union, the Russian Federation, and the United Nations.

Moreover, a functioning Palestinian Observer Mission serves United States foreign policy interests because the United Nations itself is one of the four members of the "'Quartet" sponsoring the Roadmap, and as such plays a key role in international efforts to promote a peaceful resolution of the Israeli-Palestinian dispute. *Id.* The United Nations serves as a forum for broader efforts and discussions concerning the peace process. *Id.*, For that process to succeed, it is the judgment of the United States that the Palestinians must be allowed to participate unhindered in the United Nations forum. *Id.* If the United States Government is seen to obstruct the ability of the Palestinians to engage in the United Nations discussions, the ability of the United States to effectively promote the peace process will be undermined. *Id.*, The PLO, and likely the international community at large, would regard this action as a breach of our international obligations and an effort to marginalize the Palestinian voice at the United Nations. *Id.*, The result would be reduced influence by the United States over events of vital national security importance at a most sensitive time)[22] *Id.*

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[22] That the Executive Branch considers the continuing operation of PLO missions in the United States to be in the country's national security interest is evident in the President's decision again this year to waive the application of Section 5202 of the ATA to the PLO office in Washington, D.C. Section 5202 makes illegal the receipt of benefits from the PLO, expenditure of funds from the PLO, or establishment of offices or other facilities at the direction of the PLO. See 22 U.S.C. § 5202 (codified as Section 1003 of Pub. L. No. 100-204). The memorandum of justification accompanying the President's waiver underscored the importance of the Middle East peace process "to the national security interests of the United States" and stated that Section 5202 would "interfere[] with the operation and funding" of the PLO office in Washington, D.C., and "thus hinder[] our efforts to assist the parties to combat terror and

Accordingly, for all of these reasons, it is the position of the United States that the relief sought by Plaintiffs would interfere with the Executive Branch's ability to pursue vital foreign policy objectives in the Middle East.

B. The Relief Requested By Plaintiffs Would Interfere With The United States' Relationship With The United Nations

It is also the United States' position that an order evicting the Observer Mission "would... cause serious embarrassment to the United States in its relations with the United Nations." Drori Dec., Exh. J, at 3. While the United Nations has not yet expressed its position in this matter, the United States anticipates that the United Nations would regard any order from this Court depriving the Observer Mission of its property as a violation of the United States' obligations under the Headquarters Agreement. See id. (noting the likelihood of a United Nations General Assembly condemnation of any forced

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take steps to promote... peace." See Drori Dec., Exh. N (Justification Statement for Waiver of Public Law 100-204, Section 1003 [22 U.S.C. § 5202], dated April 14, 2005); *see also id.*... ("I hereby determine and certify that it is important to the national security interests of the United States to waive the provisions of section 1003 of the Anti-Terrorism Act of 1987, Public Law 100-204."). Although a similar waiver has not been issued for the mission at the United Nations because another Judge of this Court has held that the ATA does not require closure of the Observer Mission, *see United States v. PLO*, 695 F.Supp. at 1471, the Washington mission waiver is nevertheless highly relevant because the undisturbed operation of the Observer Mission is similarly regarded by the Executive Branch to be important to United States national security interests. *See* Drori Dec., Exh. J at 3-4; *see also infra* at 21-23.

sale of property and the possibility that it will seek an advisory opinion from the International Court of Justice that the forced sale contravenes United States obligations under the Headquarters Agreement). Indeed, the General Assembly of the United Nations previously took the position that closure of the Observer Mission would violate the Headquarters Agreement. In reaction to the proposed passage of the Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 et see ("ATA"), whose terms the United Nations construed to require closure of the Observer Mission, the General Assembly adopted Resolution 42/210(B) by which it "[r]eiterate[d] that the [Observer Mission] is covered by the provisions of the [Headquarters Agreement]" and requested that the United States "abide by its treaty obligations under the Headquarters Agreement and... refrain from taking any action that would prevent the discharge of the official functions of the" Observer Mission. See Drori Dec., Exh. O (G.A. Res. 42/210B, U.N. GAOR, 42nd Sess., A/Res/42/210B (1987)). The Resolution reflected also the position of the Secretary General: "The members of the [Palestinian Observer Mission] are.., invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947." *Id.* (quoting Statement of the Secretary General of the United Nations, dated October 22, 1987).

The United Nations' position on the Headquarters Agreement is especially relevant to the United States' foreign policy interests because Section 21 of the Headquarters Agreement provides that any dispute between the United States and United Nations "concerning the interpretation or application of' the Headquarters Agreement "shall be referred for final decision to a tribunal of three arbitrators" who shall "render a final decision." *See* Drori Dec., Exh. A (Headquarters Agreement, § 21); see also Drori Dec., Exh. P *(Applicability of the Obligation to Arbitrate Under Section 21*

of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 26-27, 35 (Apr. 26) (advisory opinion from International Court of Justice that United States and United Nations'k'were "under an obligation.., to enter into arbitration" in order to resolve a dispute concerning the interpretation/application of the Headquarters Agreement)). If this Court were to grant Plaintiffs' request and order the sale of the Observer Mission, there is a distinct possibility that the United Nations would call for international arbitration with the United States pursuant to Section 21 of the Headquarters Agreement. *See* Drori Dec., Exh. J, at 3. The United States would then have to submit to international arbitration - or refuse to do so and risk further conflict with the United Nations - and to confront the political and legal quagmire that would result if the arbitrators rendered a decision in favor of the United Nations.

In that regard, the United States respectfully calls the Court's attention to *United States v. PLO*, 695 F. Supp. 1456 (S.D.N.Y. 1988), in which Judge Palmieri of this Court concluded that closure of the Observer Mission would violate the Headquarters Agreement because it would interfere with and impair the Mission's ability to carry out its functions as an invitee of the United Nations. *Id.* at 1471. *United States v. PLO* is a case that arose in connection with the 1988 passage of the *ATA*, which, among other things, forbade the establishment or maintenance of "an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the" PLO "notwithstanding any provision of law to the contrary." 22 U.S.C. § 5202(3). When the PLO failed to comply with the ATA by closing its Observer Mission, the United States sought injunctive relief to force compliance. *See United States v. PLO*, 695 F. Supp. at 1460-61. Judge Palmieri dismissed the Government's lawsuit,

holding that the ATA was not intended to apply to the Observer Mission because of the Headquarters Agreement, and therefore could not be used to close the Mission.[23] *Id.* at 1471 ("The ATA and its legislative history do not manifest Congress' intent to abrogate th[e] obligation" of the United States under the Headquarters Agreement to "*refrain from impairing the function* of the PLO Observer Mission.") (emphasis supplied).

In the course of his decision, Judge Palmieri performed an exhaustive review of both United States practice under the Headquarters Agreement and statements made by the Executive Branch concerning the United States' obligations under the Headquarters Agreement. For example, he observed that "there can be no dispute that over the forty years since the United States entered into the Headquarters Agreement it has taken a number of actions consistent with its recognition of a duty to refrain from impeding the functions of observer missions to the United Nations." *Id.* at 1466 (noting also that the "United States has, for fourteen years [since the establishment of the Observer Mission in 1974], acted in a manner consistent with a recognition of the PLO's rights in the Headquarters Agreement"). Morever, after citing various statements made by the Department of State and the United States' representative to the United Nations, Judge Palmieri concluded that "[i]t seemed clear to those in the executive

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[23] Although Section 11 of the Headquarters Agreement does not specifically refer to missions, Judge Palmieri noted both that the rights afforded under Section 11 "could not be effectively exercised without the use of offices" and that the Department of State had "at no time disputed the notion that the rights of entry, access and residence guaranteed to invitees [under Section 11] include the right to maintain offices [*i.e*, missions]." *United States v. PLO*, 695 F. Supp. at 1465-66.

branch that closing the PLO mission would be a departure from the United States' practice in regard to observer missions. . . ." *Id.* at 1467 (citing, among others, a statement by the United States' representative that "closing the mission, in our view, and I emphasize this is the executive branch, is not consistent with our international legal obligations under the Headquarters Agreement"). Judge Palmieri further noted that both Secretary of State George P. Shultz and the Honorable Abraham Sofaer, Department of State Legal Adviser, had expressed their views that closure of the Observer Mission would violate the Headquarters Agreement. *See id.* at 1470 n.35 (1987 letter from Secretary Shultz to unnamed Senators and Congressman averring that "[a]s far as the closure of the PLO Observer Mission is concerned, this would be seen as a violation of a United States treaty obligation under the United Nations Headquarters Agreement); *id.*, at 1470 n.36 (1988 quote in the *New York Times* attributed to Judge Sofaer that it is "our judgment that the Headquarters Agreement as interpreted and applied would be violated" by the ATA). All of this together led Judge Palmieri to hold that the "language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to *refrain from interference* with the PLO Observer Mission in the discharge of its functions at the United Nations." *Id.* at 1468 (emphasis supplied).[24]

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[24] Judge Palmieri also noted that Section 21 of the Headquarters Agreement applies to the resolution of disputes between the United Nations and the United States, but that he could not order the United States to submit to arbitration because, among other reasons, "the ultimate decision as to how the United States should honor its treaty obligations with the international community is one which has, for at least one hundred years, been left to the executive to decide." *Id.* at 1462-63; see also Drori Dec., Exh. Q (The Conference Report on the Foreign Missions Act, H.R. Conf. Rep.

Accordingly, because decisions concerning foreign missions are both constitutionally and legislatively committed to Executive Branch as a matter of federal law, because the Executive Branch has concluded that it is in the United States' interest to allow the Palestinian Observer Mission to operate from the property that it owns, and because the requested relief would interfere with the Executive Branch's foreign policy objectives, the United States respectfully submits that the Court should give great weight to the United States' foreign policy interests here and dismiss this matter. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004) (where the United States offers its opinion on matter of foreign policy, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Republic of Austria v. Altmann*, 541 U.S. 677, 702 124 S. Ct. 2240, 2255 (2004) (where United States files a statement of interest concerning the exercise of jurisdiction over foreign sovereigns, "that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy").

No. 693, at 43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 691,705) ("Of course, State and local governments are obliged to respect the rights of foreign missions to be granted certain benefits under international law and international agreements in force. The views of the Secretary of State on the requirements of international law are authoritative in this regard.").

Conclusion

For the reasons stated above, the United States respectfully requests that the Court dismiss this matter.

Dated: New York, New York
September 12, 2005

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CERTIFICATE OF SERVICE

I, Darma Drori, an Assistant United States Attorney for the Southern District of New York, hereby certify that on September 12, 2005, I caused a copy of the foregoing Statement of Interest of the United States of America to be served by facsimile and by messenger to:

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